

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED
04 APR 23 PM 4:41

In re:) Chapter 11
)
UAL CORPORATION, et al.,) Joint Case No. 02 B 48191
)
)
Debtors.)
)
HONORABLE EUGENE R. WEDOFF
OURHOUSE, INC.,)
)
)
Plaintiff,)
)
)
v.)
)
Adversary No. 04 A 02086
)
UAL CORPORATION, AIR WIS)
SERVICES, INC., AIR WISCONSIN,)
INC., BIZJET CHARTER, INC., BIZJET)
FRACTIONAL, INC., BIZJET)
SERVICES, INC., CONFETTI, INC.,)
CYBERGOLD, INC., DOMICILE)
MANAGEMENT SERVICES, INC., FOUR)
STAR LEASING, INC., ITARGET.COM,)
INC., KION LEASING, INC., MILEAGE)
PLUS HOLDINGS, INC., MILEAGE)
PLUS MARKETING, INC., MILEAGE)
PLUS, INC., MYPPOINTS OFFLINE)
SERVICES, INC., MYPPOINTS.COM,)
INC., PREMIER MEETING AND)
TRAVEL SERVICES, INC., UAL)
BENEFITS MANAGEMENT, INC., UAL)
COMPANY SERVICES, INC., UAL)
LOYALTY SERVICES, INC., UNITED)
AIR LINES, INC., UNITED AVIATION)
FUELS CORPORATION, UNITED)
BIZJET HOLDINGS, INC., UNITED)
COGEN, INC., UNITED GHS INC.,)
UNITED VACATIONS, INC., UNITED)
WORLDWIDE CORPORATION,)
FREDERIC F. BRACE, DOUGLAS A.)
HACKER, FRANCESCA M. MAHER,)
RICHARD J. POULTON, SCOTT M.)
PRAVEN, STEVEN M. RASHER,)
ROBERT B. SAHADEVAN, and the)
OFFICIAL COMMITTEE OF)
UNSECURED CREDITORS OF UAL)
CORPORATION and each of its jointly-)
administered debtors,)

Defendants.

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
APR 23 2004
KENNETH S. GARDNER, CLERK
PS REP. - JJ

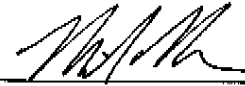
NOTICE OF EMERGENCY MOTION

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on the 26th day of April, 2003, at 9:30 a.m., Debtors shall appear before the Honorable Bankruptcy Judge Eugene R. Wedoff in Room 744 at the United Bankruptcy Court for the Northern District of Illinois, Eastern Division at the 219 S. Dearborn St., Chicago, Illinois, 60603, and present the attached **Debtors' Emergency Motion to Dismiss Counts IV and V**, a copy of which is attached hereto and herewith served upon you.

Dated: April 23, 2004

UAL CORPORATION et al.

By: 
James H.M. Sprayregen, P.C. (ARDC No. 6190206)
David R. Seligman (ARDC No. 6238064)
Marc Kieselstein (ARDC No. 6199255)
Salvatore F. Bianca (ARDC No. 6278974)
Kirkland & Ellis LLP
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000 (telephone)
(312) 861-2200 (facsimile)

Counsel for the Debtors and Debtors in Possession

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NORTHERN DISTRICT OF ILLINOIS
APR 23 2004
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PS REP. - JJ

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S. B.C. RECORD
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In re:) Chapter 11
)
UAL CORPORATION, et al.,) Joint Case No. 02 B 48191
)
Debtors.)
)
OURHOUSE, INC.,) Honorable Eugene R. Wedoff
)
Plaintiff,)
)
v.)
) Adversary No. 04 A 2086
)
UAL CORPORATION, AIR WIS SERVICES,)
INC., AIR WISCONSIN, INC., BIZJET)
CHARTER, INC., BIZJET FRACTIONAL, INC.,)
BIZJET SERVICES, INC., CONFETTI, INC.,)
CYBERGOLD, INC., DOMICILE)
MANAGEMENT SERVICES, INC., FOUR STAR)
LEASING, INC., ITARGET.COM, INC., KION)
LEASING, INC., MILEAGE PLUS HOLDINGS,)
INC., MILEAGE PLUS MARKETING, INC.,)
MILEAGE PLUS, INC., MYPOINTS OFFLINE)
SERVICES, INC., MYPOINTS.COM, INC.,)
PREMIER MEETING AND TRAVEL)
SERVICES, INC., UAL BENEFITS)
MANAGEMENT, INC., UAL COMPANY)
SERVICES, INC., UAL LOYALTY SERVICES,)
INC., UNITED AIR LINES, INC., UNITED)
AVIATION FUELS CORPORATION, UNITED)
BIZJET HOLDINGS, INC., UNITED COGEN,)
INC., UNITED GHS INC., UNITED)
VACATIONS, INC., UNITED WORLDWIDE)
CORPORATION, FREDERIC F. BRACE,)
DOUGLAS A. HACKER, FRANCESCA M.)
MAHER, RICHARD J. POULTON, SCOTT M.)
PRAVEN, STEVEN M. RASHER, ROBERT B.)
SAHADEVAN, and the OFFICIAL COMMITTEE)
OF UNSECURED CREDITORS OF UAL)
CORPORATION and each of its jointly-)
administered debtors,)
)
Defendants.)

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
APR 23 2004
KENNETH S. GARDNER, CLERK
PS REP. - JJ

DEBTORS' EMERGENCY MOTION TO DISMISS COUNTS IV AND V

The above-captioned debtors and debtors in possession (collectively, the "Debtors") hereby (a) move the Court (the "Motion") to Dismiss Counts IV and V of the above captioned adversary complaint for lack of standing pursuant to Fed. R. Civ. P. 12(b)(1). In support of the Motion, the Debtors state as follows.

Introduction

1. The actions contained in Counts IV and V of OurHouse's adversary complaint captioned *OurHouse v. UAL, Inc. et al.*, Adversary No. 04 A 02086 are unquestionably property of the Debtors' estates. Consequently, pursuant to *Fogel v. Zell*, 221 F.3d 955, 966 (7th Cir. 2000), OurHouse lacks standing to pursue such actions without prior relief from the Court upon a showing that the Debtors shirked their fiduciary responsibilities in failing to pursue the claims alleged in Counts IV and V. *Id.* As OurHouse has not obtained such relief from the Court, OurHouse lacks standing to bring the derivative actions alleged in Counts IV and V of its adversary complaint, and Counts IV and V should, therefore, be dismissed.

2. Moreover, certain senior officers and directors of the Debtors who are intimately involved in the Debtors' restructuring efforts and day to day operations (as well as certain former UAL employees, UAL's former general counsel) and who also may be required to testify in the April 26, 2004 trial on OurHouse's disputed claim are identified as defendants in Counts IV and V of OurHouse's complaint. Continued pursuit of Counts IV and V of OurHouse's complaint, thus, threatens to create a severe distraction of and disruption to the efforts of such individuals to assist in the Debtors' restructuring and was clearly timed to intimidate potential witnesses at trial in an effort to create settlement leverage. The Debtors believe that it is absolutely appropriate that the Debtors attempt to bring an immediate stop to the unnecessary distraction and

harassment of its directors and officers. Indeed, this carefully-timed attempt to coerce a settlement and to intimidate witnesses by creating a specter of tens of millions of dollars of personal liability for individuals playing a key role in United's restructuring, should not be countenanced by this Court.

Jurisdiction

3. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (O).

4. Venue of this proceeding and the Motion is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

5. The bases for the relief requested herein are Section 541(a)(1) of Title 11 of the United States Code as amended from time to time (the "Bankruptcy Code") and Federal Rule of Civil Procedure 12(b)(1) as incorporated by Rule 7102 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

Background

6. On December 9, 2002 (the "Petition Date"), the Debtors filed voluntary petitions for relief under the Bankruptcy Code and commenced the above-captioned Chapter 11 cases (the "Chapter 11 Cases"). The Debtors continue to operate their businesses and manage their properties as debtors and debtors in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. On December 13, 2002, the United States Trustee appointed an official committee of unsecured creditors (the "Creditors' Committee").

7. On or about, April 15, 2004, OurHouse filed an adversary complaint against, among others, the Debtors and certain officers and directors (the D&O's) of UAL Loyalty Services, Inc. ("ULS"), Case No. 04 A 02086 (the "OurHouse Adversary"). Counts IV and V of the OurHouse Adversary seek recovery against the Debtors

and the certain of the Debtor's officers and directors for alleged "illegal dividends" under, purportedly, both bankruptcy and non-bankruptcy law. *See* Complaint¶¶ 97 and 98.

8. Counts IV and V, seeking to recover alleged illegal dividends from the Debtors and their directors and officers (*i.e.* derivative actions), are property of the Debtors' estates.

Argument

A. Counts IV and V of the OurHouse Adversary are Property of the Debtors' Estates.

(1) Claims for unlawful dividends are derivative actions under Delaware law, and therefore, property of the Debtors' estates.

9. Counts IV and V, which are claims for recovery of illegal dividends, are derivative actions under Delaware law. *Kramer v. Western Pacific Industries, Inc.* 546 A.2d 348, 353 (Del. S. Ct. 1988) (holding that excessive payment from corporate funds constitutes derivative action); *see also In re Rexene Corporation Shareholders Litigation*, 1991 WL 77529 *3 (Del. Ch.) (holding that "claims of waste, self-dealing and improper payment of excessive dividends have been held to be derivative and not individual"); *Hall v. Sunshine Mining Company ("In re Sunshine Precious Metals, Inc.")*, 157 B.R. 159, 163 (Bankr. D. Idaho 1993) (holding that the language of the Delaware statute providing a remedy for illegal dividends "demonstrates on its face that the injury to creditors is derivative.")

10. The commencement of a bankruptcy case creates an estate for the benefit of creditors which encompasses "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The bankruptcy estate includes all legal claims owned by a corporate debtor, including derivative actions. *Fogel*, 221 F.3d at 966; *see also Matter of Consolidated Bancshares*, 785 F.2d 1249, 1253-54 (5th Cir. 1986); *see also West v. H&R Block Tax Services, Inc.*, No. 03 C 4289, 2003 WL 22995158 *2 (N.D. Ill.) (Kocoras, Chief J.), holding that when a debtor files for bankruptcy:

“virtually all property of the debtor at that time becomes property of the bankruptcy estate.” *In re Yonikus*, 996 F.2d 866, 869 (7th Cir.1993). Section 541 of the Bankruptcy Code creates a bankruptcy estate comprised of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). What constitutes an “interest” of the debtor is interpreted extremely broadly as “every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of [11 U.S.C. § 541(a)(1).]” *Yonikus* at 869. Among the vast range of potential property belonging to a debtor, 11 U.S.C. § 541(a)(1) “has uniformly been interpreted to include causes of action. *In re Polis*, 217 F.3d 899, 901 (7th Cir.2001)..

Id.

11. Therefore, as derivative actions, Counts IV and V are property of the Debtors’ estates.

**(2) Avoidance and recovery actions under the Bankruptcy Code
are property of the Debtors’ estates**

12. Although OurHouse alleges that it may pursue recovery actions under the Bankruptcy Code, it makes no reference as to what provision allows it such authority. *See* OurHouse Adversary ¶ 97. To the extent OurHouse bases Count IV on Sections 542, 543, 544, 547 or 548 of the Bankruptcy Code, the Debtors are the sole party with the authority to pursue such avoidance and/or recovery actions. *See In re Xonics Photochemical, Inc.*, 841 F.2d 198, 202-03 (7th Cir. 1988) (stating that actions under Sections 544(b) and 548(a) belong to the trustee or debtor in possession); *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1342-43 (7th Cir. 1987) (“The trustee’s single effort [to pursue avoidance actions] eliminates the many wasteful and competitive suits of individual creditors”); *Dana Molded Products, Inc. v. Brodner*, 58 B.R. 576, 578 (N.D. Ill. 1986) (holding that a creditor’s standing to pursue fraudulent conveyances and similar derivative claims succeeds solely to the trustee/debtor in possession in event of bankruptcy); *In re Allard*, 198 B.R. 715, 719 (Bankr. N.D. Ill. 1996)

("Generally, individual creditors are not empowered to use the trustee's avoiding powers either for their own benefit or for the benefit of the estate, not even to attack transfers the creditors could have avoided under state law because of harm to them personally"); *see also West*, 2003 WL 22995158 *2 (holding creditor did not have standing to pursue action belonging to the debtor's estate).

13. In sum, regardless of whether OurHouse is pursuing Counts IV and V under state or bankruptcy law, it is black letter law that Counts IV and V, seeking to recover alleged illegal dividends, are property of the estate.

B. Counts IV and V should be dismissed because OurHouse lacks standing to bring the claims alleged in Counts IV and V.

14. As Counts IV and V are the sole property of the Debtors, OurHouse lacks standing to pursue such judgments, and therefore, Counts IV and V should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). *Fogel*, 221 F.3d at 966; *Perry v. Village of Arlington Heights*, 186 F.3d 826, 829 (7th Cir. 1999) (holding upon challenge of standing pursuant to (12)(b)(1), motion will be granted unless non-moving party can establish facts supporting standing with "competent proof"); *In re American Federation of Gov. Employees Local 2119 v. Cohen*, 171 F.3d 460 (holding 12(b)(1) is appropriate vehicle for dismissal of complaint for lack of standing) *Xonics Photochemical*, 841 F.2d at 202-03 (holding debtor/trustee is sole party with standing to pursue actions on behalf of debtor); *Koch Refining*, 831 F.2d at 1342-43 (same); *Dana Molded Products*, 58 B.R. at 578 (same); *In re Allard*, 198 B.R. at 719 (same); *see also, Solow v. Stone*, 994 F.Supp. 173, 180 (S.D.N.Y. 1998) (dismissing derivative action filed by "sole non-insider significant creditor" for of lack of standing pursuant to 12(b)(1)).

15. Whether standing exists is paramount inquiry into a court's subject matter jurisdiction over a case, as it is "the threshold question in every federal case, determining the

power of the court to entertain the suit.” *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). “In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a “case or controversy” between himself and the defendant within the meaning of [Article III of the Constitution.]” *Id.*

16. If standing is challenged by the defendant, the plaintiff must establish by a preponderance of the evidence that standing exists. *Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir. 2003). A dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) is appropriate, where standing is challenged as a factual matter, when a plaintiff fails to support the allegations necessary for standing with “competent proof.” *Retired Chicago Police Ass’n v. City of Chicago*, 76 F.3d 856, 862 (7th Cir.1996); *Perry*, 186 F.3d at 829; *Allstate Ins. Co. v. City of Chicago*, 2003 WL 1877670, *3 (N.D.Ill. 2003). The Seventh Circuit has interpreted “competent proof” as “requiring a showing by a preponderance of the evidence, or proof to a reasonable probability, that standing exists.” *Id.*, citing *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir.), *cert. denied*, 515 U.S. 1104 (1995).

17. Courts must resolve questions of standing according to a two-part inquiry that considers “both constitutional limitations of federal-court jurisdiction and prudential limitations in its exercise.” *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979) (quoting *Warth*, 422 U.S. at 498, 95 S.Ct. at 2205 (1975)). Ordinarily, “a litigant seeking relief in federal court must satisfy both constitutional and prudential limitations in order to have standing to sue.” *Locals 666 and 780 v. United States Dept. of Labor*, 760 F.2d 141, 143 (7th Cir.) (emphasis in original), *cert. denied*, 474 U.S. 901, 106 S.Ct. 227, 88 L.Ed.2d 227 (1985).

18. Even if a party satisfies the Article III criteria, there are several judicially self-imposed limits on the exercise of federal jurisdiction that may preclude a litigant's standing, including:

the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

19. These prudential limitations on standing eliminate cases "where no individual rights would be vindicated" and restrict "access to federal courts to those litigants best suited to assert a particular claim." *Gladstone*, 441 U.S. at 100, 99 S.Ct. at 1608.

20. In the present case, it is simply undisputable that OurHouse lacks standing to pursue the causes of action alleged in Counts IV and V as they are and remain property of the Debtors' estates. *Fogel*, 221 F.3d at 966; *Perry v. Village of Arlington Heights*, 186 F.3d 826, 829 (7th Cir.1999); *Xonics Photochemical*, 841 F.2d at 202-03; *Koch Refining*, 831 F.2d at 1342-43; *Dana Molded Products*, 58 B.R. at 578; *In re Allard*, 198 B.R. at 719; *see also, Solow*, 994 F.Supp. at 180.

21. OurHouse has *not even attempted to plead* any basis for jurisdiction, such as (i) "special injury" establishing Counts IV and V as individual actions, or (ii) prior relief from the Court to pursue the Debtors' actions. Indeed, that is because, simply, such facts do not exist, and without question, OurHouse cannot establish any such facts with "competent facts." *See Perry*, 186 F.3d at 829

22. Therefore, Counts IV and V should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

Notice

23. Notice of this Motion has been given to (a) the United States Trustee; (b) counsel for the Debtors' debtor in possession lenders; (c) counsel for the Official Committee of Unsecured Creditors; (d) counsel for the U.S. Trustee; (e) counsel to OurHouse; and (f) all persons currently on the 2002 Service List. In light of the nature of the relief requested, the Debtors submit that no further notice is necessary.

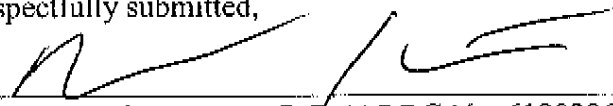
No Prior Request

24. No previous request for the relief sought herein has been made to this or any other Court.

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto (a) dismissing Counts IV and V of the OurHouse Adversary, and (b) granting such other and further relief as this Court may deem just and proper.

Dated: Chicago, Illinois
April 23, 2004

Respectfully submitted,


James H.M. Sprayregen, P.C. (ARDC No. 6190206)
Marc Kieselstein, Esq. (ARDC No. 6199255)
David R. Seligman, Esq. (ARDC No. 6238064)
Salvatore F. Bianca, Esq. (ARDC No. 6278974)
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000 (telephone)
(312) 861-2200 (facsimile)
Counsel for the Debtors and Debtors in Possession

Westlaw.

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Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Eastern Division.

ALLSTATE INSURANCE COMPANY, Atlantic
Mutual Insurance Company, Encompass
Insurance, Hartford Casualty Insurance Company, St.
Paul Companies, State Farm
Fire and Casualty and State Farm Mutual Auto, both
individually and as
subrogees of their respective insureds, Plaintiffs,

v.

CITY OF CHICAGO, a municipal corporation, and
Harza Environmental Services,
Inc., a/k/a Harza Engineering Company, Defendants.

No. 02 C 5456.

April 14, 2003.

MEMORANDUM OPINION AND ORDER

LEFKOW, J.

*1 Plaintiffs, Allstate Insurance Company, Atlantic Mutual Insurance Company, Encompass Insurance, Hartford Casualty Insurance Company, St. Paul Companies, State Farm Fire and Casualty and State Farm Mutual Auto (collectively "plaintiffs") bring this law suit against defendants, the City of Chicago ("Chicago") and Harza Environmental Services ("Harza") alleging violations of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.* (Count I), and, under Illinois law, negligence (Count II), nuisance (Count III) and trespass (Count IV). Chicago and Harza each have moved to dismiss the plaintiffs' Complaint under Rules 12(b)(1) and 12(b)(6), Fed.R.Civ.P. The court has jurisdiction over the claims pursuant to 33 U.S.C. § 1365 and 28 U.S.C. § 1367. For the reasons set forth below, the court dismisses the CWA claims for lack of standing and dismisses without prejudice the state law claims.

MOTION TO DISMISS STANDARDS

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the court's subject

matter jurisdiction. In determining whether subject matter jurisdiction exists, the court is not required to accept plaintiffs' allegations as true. A "district court ha[s] not only the right, but the duty to look beyond the allegations of the complaint to determine that it ha[s] jurisdiction...." *Hay v. Indiana State Bd. of Tax Comm'rs.*, 312 F.3d 876, 879 (7th Cir.2002). However, when examining the material allegations of the complaint, the court must draw all reasonable inferences therefrom in favor of the plaintiff. *Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 862 (7th Cir.1996).

Conversely, a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) challenges the sufficiency of the complaint for failure to state a claim upon which relief may be granted. *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080 (7th Cir.1997). Dismissal is appropriate only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Kennedy v. Nat'l Juvenile Det. Assoc.*, 187 F.3d 690, 695 (7th Cir.1999). In ruling on the motion, the court accepts as true all well pleaded facts alleged in the complaint, and it draws all reasonable inferences from those facts in the plaintiff's favor. *Dixon v. Page*, 291 F.3d 485, 486 (7th Cir.2002); *Jackson v. E.J. Bruch Corp.*, 176 F.3d 971, 977 (7th Cir.1999).

FACTS [FN1]

[FN1. The facts as set forth herein are taken from plaintiffs' Complaint and a copy of the letter plaintiffs sent to Chicago and Harza as required by § 1365(b)(1)(a) of the CWA. The notice letter may be referenced on this motion to dismiss because it is attached as an exhibit to the Complaint and explicitly incorporated by reference. *E.g., Tierney v. Vahle*, 304 F.3d 734, 737 (7th Cir.2002); *Beanstalk Group, Inc. v. AM Gen. Group*, 283 F.3d 856, 858 (7th Cir.2002).

Chicago operates a combined sewer system designed to remove both raw sewage and storm water from within Chicago's city limits. Harza acted and continues to act as the engineering design consultant to Chicago and supervises the ongoing "Rainblocker"

program, which has the purpose of retrofitting the storm water aspect of the combined sewer system. Under the Rainblocker program, the amount of storm water flow into the sewers was to be limited by a number of measures, the purpose being to prevent overtaxation of the sewer's capacity to convey the water away. Previously, because of the nature of the combined system, any measurable level of rainfall would fill up the combined sewers, causing the sewers to overflow, back up in basements, and eventually discharge into navigable waters in the area. The concept of Rainblocker was to limit the entry of storm water into the sewers through disconnecting homeowner "down spouts" and placing inlet restrictors between the streets and sewers. In theory, this two part process diverts run-off away from the sewers and limits the amount of water intake from the street into the sewer system. The end result would be the elimination of flooding and sewer discharge into area navigable waters after storms.

*2 According to plaintiffs, one of the key components of the system was that the residential "down spouts" were to be disconnected. If the down spouts were not disconnected, plaintiffs allege that the Rainblocker program would not function according to the plan's design, and flooding and sewer discharge in basements and navigable waters would continue. Plaintiffs allege that the Rainblocker program was not effective because Chicago and Harza did not systematically and uniformly disconnect the down spouts on residential properties. As a result, damage resulted to basements and other property of homeowners that were insured by plaintiffs. Plaintiffs further allege that both Chicago and Harza exceeded waste water discharge limits as well as the permissible point source limitations under the CWA contained in the National Pollutant Discharge Elimination System ("NPDES") permit issued to Chicago (Permit No. IL 0045012) (the "NPDES permit").

Plaintiffs maintain that they are property insurance carriers that afford property insurance to thousands of individuals and businesses that own, occupy or operate rental apartments, automobiles, houses, offices, stores, condominiums, warehouses, factories, restaurants, and other types of commercial and residential property situated within Chicago, and these insureds use and enjoy the ecosystems affected by storm water discharges and sources governed by the NPDES permit issued to Chicago. Moreover, plaintiffs allege that, because of their respective insurance policies with the insureds (a list of whom are attached to the complaint), they are subrogated to the claims of those respective insureds against

Chicago and Harza based on property damage sustained.

DISCUSSION

Plaintiffs seek injunctive and compensatory relief for Chicago and Harza's alleged violations of the CWA (Count I), negligence (Count II), nuisance (Count III) and trespass (Count IV). Chicago moves for dismissal of plaintiffs' CWA claims because plaintiffs (1) failed to give Chicago adequate notice as required under the CWA and (2) lack standing. As for the state law claims, Chicago argues, all such claims should be dismissed because Chicago has discretionary immunity for its acts or omissions in installing, constructing, operating and maintaining the Rainblocker program. Finally, Chicago argues that the insurance companies have requested inappropriate relief. Harza moves for dismissal on grounds that (1) any flooded basements and standing water are not protected waters of the United States under the CWA; (2) failure to disconnect the down spouts or otherwise implement the Rainblocker program was not a NPDES permit violation; (3) subrogated insurers' interests are not protected by the CWA; (4) plaintiffs lack standing; (5) plaintiffs' Notice letter and Complaint allege no violation by Harza; (6) Harza cannot be liable because it is neither a permittee nor an operator; and (7) plaintiffs fail to allege proximate cause necessary for tort liability. Because the court concludes that plaintiffs lack standing to assert the CWA claims, it considers only that argument and will analyze the CWA and state law claims separately.

A. Standing under the CWA

*3 The question of standing is "the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." *Id.* The burden of establishing the required elements of standing lies with the plaintiff. *Retired Chicago Police Ass'n*, 76 F.3d at 862, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) is appropriate, where standing is challenged as a factual matter, when a plaintiff fails to support the allegations necessary for standing with "competent proof." *Id.*; *Perry v. Village of Arlington Heights*, 186 F.3d 826, 829 (7th Cir.1999). The Seventh Circuit has interpreted "competent proof" as "requiring a

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showing by a preponderance of the evidence, or proof to a reasonable probability, that standing exists." *Id.*, citing *NLFC, Inc. v. Dexcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir.), cert. denied, 515 U.S. 1104 (1995).

A showing of constitutional standing requires (1) an actual or threatened injury-in-fact (2) that is fairly traceable to the defendant's alleged violation of the CWA and (3) that could be redressed if the plaintiff wins in the lawsuit. *Lujan*, 504 U.S. at 560-61. Perhaps acknowledging that any injury in this case (i.e., having to pay out claims under insurance policies) is traceable to flooded basements and other property damage but not to discharges into navigable waters, plaintiffs attempt to proceed under the doctrine of associational standing. As stated by the Seventh Circuit in *Retired Chicago Police Ass'n*,

The doctrine of associational standing is an exception to the general prohibition of representational standing. In order to obtain associational standing, an organization must meet the three prong-test set forth in *Hunt v. Washington State Apple Advertising Comm'n*:

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit, 432 U.S. 33, 343, 97 S.Ct. 2434, 2441, 53 L.E.2d 383 (1977); see also *Sanner v. Board of Trade*, 62 F.3d 918, 922 (7th Cir.1995).

76 F.3d at 862-63. Before considering the factors above, the threshold question is whether the insurance companies even qualify as an association and its insureds as members. To qualify under a theory of associational standing, the insureds would have to "possess all of the indicia of members in an organization." *Hunt*, 432 U.S. at 344. The court in *Hunt* found the following factors relevant in finding a state agency an association even though it was not a traditional voluntary membership organization,

*4 [The members] alone elect the members of the Commission; they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them. In a very real sense, therefore, the Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests.

Id. at 344-45. In a situation similar to the one present here, another district court found an insurance company not to qualify as an association and its insureds not to qualify as members. See *Group*

Health Plan, Inc. v. Philip Morris Inc., 86 F.Supp.2d 912, 918 (D.Minn.2000). After discussing the indicia of membership characteristics described in *Hunt*, the court noted,

In this case, Plaintiffs' members do not appear to possess any of these characteristics. In fact, Plaintiffs do not even allege the requisite indicia of membership. Instead, Plaintiffs describe themselves as health maintenance organizations that contract with health care service providers and purchase health care services for their members.... Thus, the relationship between Plaintiffs and their "members" is most aptly described as [] that of a business-consumer relationship, which is readily distinguishable from the traditional association-member relationship necessary to support an assertion of associational standing.

Id.

Even viewing the facts in plaintiffs' Complaint as true, no indicia of membership in an organization is present so as to grant the plaintiffs standing under an association theory. The relationship between the insureds and the plaintiffs is a business-consumer relationship whereby the insured purchases insurance from the plaintiffs for coverage against certain losses. The insureds have no input as to how the plaintiffs run their business or who is in control. The plaintiffs are not a forum for the insureds to otherwise express their views or have their interest in a clean environment protected. The plaintiffs also do not provide the means by which the insureds express their collective views or protect their collective interests. Accordingly, the court concludes that plaintiffs are not "organizations" and their insureds not "members" for which the plaintiffs may assert their insureds' rights under the CWA. [FN2]

FN2. Even if an insurance company were found to be an association and its insureds members of that association, the interests sought for protection here are far from an insurance company's "germane purpose." The purpose of such an organization would not be to prevent excessive discharges under the CWA or to protect its insureds' interests in clean ecosystems. Instead, the purpose of such an organization is to collect payments from insureds, to pay out claims according to its policies, and attempt to recoup on claims. While the plaintiffs maintain that they would pay any health or property damage claims that their insureds suffer, this does not transform the "germane purpose" of an insurance company away from a private

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profit-motivated corporation.

In further support of standing, plaintiffs argue, under a subrogation theory, that if an insured could have brought the claim independently, then the insurer can also. Simply put, plaintiffs paint with too broad a brush. While the court does not doubt that under the law of subrogation an insurer can stand in the shoes of its insured, this would only be the case for the particular claim or debt paid. *E.g., Walker v. Ridgeview Constr. Co.*, 316 Ill.App.3d 592, 597, 736 N.E.2d 1184, 1188 (2000) ("the doctrine of Subrogation is a method whereby one who has involuntarily paid a debt or claim of another succeeds to the right of the other *with respect to the claim or debt so paid.*") (emphasis added); *see also, State Farm Gen. Ins. Co. v. Stewart*, 288 Ill.App.3d 678, 682-83, 681 N.E.2d 625, 628 (1997). This doctrine does not allow an insurer to assert broader claims, such as CWA claims, for the insured, at least not when the particular claim paid is unrelated to the CWA. Whatever subrogated claims the plaintiffs could assert on behalf of their insureds for the flooding of the basements or similar damages, such claims would not include actions under the CWA for pollutants allegedly discharged in navigable waters in excess of an NPDES permit. Contrary to plaintiffs' suggestions, the court will not read any subrogation rights broad enough to include interests their insureds have in the use and enjoyment of the ecosystems allegedly affected by the unauthorized discharges by Chicago and Harza.

*5 Because the court concludes that plaintiffs lack standing to assert CWA claims on behalf of their insureds, the court lacks subject matter over plaintiffs' Count I claim. Accordingly, the CWA claim is dismissed with prejudice.

B. State Law Claims

With the dismissal of the CWA claim, the court is left with state law negligence, nuisance and trespass claims for which it has only supplemental jurisdiction under 28 U.S.C. § 1367. Under § 1367(c)(3), the court may decline to exercise supplemental jurisdiction when all claims over which original jurisdiction is present are dismissed. *See* 28 U.S.C. § 1367(c)(3) ("The district court may decline to exercise supplemental jurisdiction over a claim ... if ... the district court dismissed all claims over which it has original jurisdiction."). Both Harza and Chicago urge the court to address the merits of the state tort claims because "when a state-law claim is clearly without merit, it invades no state interest-on the

contrary, its spares the overburdened state court additional work that they do not want or need...." *Cog v. County of Cook*, 162 F.3d 491, 496 (7th Cir.1998). This, however, is not the normal course in this circuit. *E.g., Groce v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir.1999) ("[I]t is the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial.").

Because these claims are based on and raise issues of Illinois state law and because Illinois state courts have greater familiarity and expertise in dealing with such issues, the court declines to exercise supplemental jurisdiction. As such, these state law claims are dismissed without prejudice.

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Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Eastern Division.

Clifton M. WEST, Plaintiff,
v.
H & R BLOCK TAX SERVICES, INC.; H & R
Block Tax Company, LLC; and H & R Block
Support Services, LLC, Defendants.

No. 03 C 4289.

Dec. 15, 2003.

Clifton M. West, pro se, Chicago, IL, for Plaintiff.

Robert E. Arroyo, Brian Dennis McCarthy, Christine
Patricia Shields, Jackson Lewis LLP, Chicago, IL, for
Defendants.

MEMORANDUM OPINION

KOCORAS, Chief J.

*1 This matter comes before the Court on Defendants' (collectively referred to as "H & R Block") motion for summary judgment. For the reasons set forth below, the motion is granted.

BACKGROUND

Plaintiff Clifton West ("West") is a former employee of H & R Block. West is suing under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981, contending that he was discriminated against and constructively discharged on account of his race. H & R Block's alleged discriminatory conduct occurred between June 2000 and April 8, 2003. West initiated the present action by filing a charge of discrimination (the "Charge") with the Equal Employment Opportunity Commission ("EEOC"), against H & R Block, on March 24, 2003. The EEOC issued West a Notice of Right to Sue, dated March 27, 2003. West then filed the present lawsuit on June 23, 2003.

Before filing this lawsuit, but after receiving his Notice of Right to Sue from the EEOC, West filed for

Chapter 7 bankruptcy protection in the U.S. Bankruptcy Court for the Northern District of Illinois on May 15, 2003. This was the third time West had filed for bankruptcy and, in preparing his petition, he relied on a "Made E-Z Do It Yourself Bankruptcy Kit." Among the Bankruptcy Court documents that West was required to complete, one contained the following question, under the heading "Suits and administrative proceedings, executions, garnishments and attachments":

List all suits and administrative proceedings to which the debtor is or was a party within one year preceding the filing of this bankruptcy case.
Pl.'s Ex. C.

In response to this question, West marked a box labeled "None." On July 17, 2003, the Bankruptcy Court entered West's appointed trustee's "Report of Trustee in No-Asset Case," which included the appointed trustee's finding that "after diligent inquiry into the property of this estate ... there are no assets in this estate to be administered for the benefit of creditors." Def.'s App. Ex. E. West concedes that he inappropriately failed to disclose to his appointed trustee or the Bankruptcy Court that he had filed an EEOC charge or the subsequent lawsuit against H & R Block, but West maintains that his omission was unintentional. In any event, on September 16, 2003, the Bankruptcy Court granted West's petition thereby discharging West's debts and closing West's bankruptcy case.

H & R Block now moves for summary judgment, asserting that West lacks standing to sue H & R Block.^[FN1] They argue that West's claims are property of his bankruptcy estate and as such can be prosecuted only by his trustee.

^[FN1] H & R Block also moves to dismiss certain claims in West's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

LEGAL STANDARD

Summary judgment is appropriate when the record, viewed in the light most favorable to the non-moving party, reveals that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). On summary judgment the moving party must identify "those portions of 'the pleadings, depositions,

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answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c)). This initial burden may be satisfied by presenting specific evidence on a particular issue or by pointing out "an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once the movant has met this burden, the non-moving party cannot simply rest on the allegations in the pleadings, but, "by affidavits or as otherwise provided for in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The court must consider the record as a whole in a light most favorable to the non-moving party and draw all reasonable inferences in favor of the non-moving party. *Id.* at 255; Bay v. Cassens Transport Corp., 212 F.3d 969, 972 (7th Cir.2000). With these considerations in mind, we now turn to the present motion.

DISCUSSION

*2 H & R Block argues that summary judgment should be entered in its favor because West lacks standing to bring this lawsuit. H & R Block asserts that West's claims do not "belong" to him and are instead the property of his bankruptcy estate.

Whether standing exists is paramount inquiry into a court's subject matter jurisdiction over a case, as it is "the threshold question in every federal case, determining the power of the court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of [Article III of the Constitution.]" *Id.* If standing is challenged by the defendant, the plaintiff must establish by a preponderance of the evidence that standing exists. Lee v. City of Chicago, 330 F.3d 456, 468 (7th Cir.2003). Standing is typically challenged as a jurisdictional matter via a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). Allstate Ins. Co. v. City of Chicago, 2003 WL 1877670, *3 (N.D.Ill.2003). However, because "lack of subject matter jurisdiction may be raised at any time before final judgment and cannot be waived by the parties," Home Builders Ass'n of Greater

Chicago v. U.S. Army Corps of Engineers, 2001 WL 293641, *4 (N.D.Ill.2001) (citations omitted), "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed.R.Civ.P. 12(h)(3).

H & R Block argues that West lacks standing because his employment discrimination claims do not "belong" to him but rather are property of his bankruptcy estate. When a debtor, such as West, files for Chapter 7 bankruptcy protection, "virtually all property of the debtor at that time becomes property of the bankruptcy estate." In re Yonikus, 996 F.2d 866, 869 (7th Cir.1993). Section 541 of the Bankruptcy Code creates a bankruptcy estate comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). What constitutes an "interest" of the debtor is interpreted extremely broadly as "every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of [11 U.S.C. § 541(a)(1)]." *Yonikus* at 869. Among the vast range of potential property belonging to a debtor, 11 U.S.C. § 541(a)(1) "has uniformly been interpreted to include causes of action." In re Polis, 217 F.3d 899, 901 (7th Cir.2001). To become property of the bankruptcy estate, causes of action need not have been filed in court prior to the bankruptcy petition, *id.* at 902, and "the point in time to look at is when the Plaintiff's cause of action accrued." Gulley v. Winnebago County Forest Preserve District, 1992 WL 185938, *2 (N.D.Ill.1992).

*3 It is clear that West's claims against H & R Block had materialized well before he filed for Bankruptcy on May 15, 2003. For bankruptcy purposes, his claims "accrued" no later than April 8, 2003, when West alleges that he was constructively discharged on account of his race. West's cause of action was certainly an asset at the time he received his Notice of Right to Sue from the EEOC on April 11, 2003, and should have been disclosed to the Bankruptcy Court. West's assertion that his failure to include his claims against H & R Block was unintentional is unavailing. Debtors in bankruptcy "have an absolute duty to report whatever interests they hold in property, even if they believe their assets are worthless or are unavailable to the bankruptcy estate." In re Yonikus, 974 F.2d 901, 904 (7th Cir.1992). A debtor's property that is not disclosed to the bankruptcy court is either abandoned or "remains part of the estate even after the closing of the bankruptcy case." Nationwide Acceptance Corp. v. Markoff, Krasny, Goldman & Grant, 2000 WL

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1230434, *3 (N.D.Ill.2000).

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Having determined that West's claims of discrimination against H & R Block are property of his bankruptcy estate, [FN2] it is clear that he lacks standing to bring the present cause of action. This is because in Chapter 7 bankruptcies such as West's "only the trustee has standing to prosecute or defend a claim belonging to the estate." Cable v. Ivy Tech State College, 200 F.3d 467, 472 (7th Cir.1999) (emphasis in original). This result is consistent with other district courts applying Seventh Circuit law, which have found that Title VII plaintiffs in Chapter 7 bankruptcy lack standing to prosecute their claims, which are legally property of the bankruptcy estate and can only be brought by the trustee. See Gulley v. Winnebago County Forest Preserve District, 1992 WL 185938 (N.D.Ill.1992); Guyon v. Potter, 2002 WL 243626 (S.D.Ind.2002). Since West lacks standing, this court does not have subject matter jurisdiction over his claims, which must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(3).

FN2. In the alternative, West's claims would be abandoned and thus not his to bring, which would also lead to the conclusion of lack of standing.

CONCLUSION

Based on the foregoing analysis, H & R Block's motion for summary judgment is granted. H & R Block's contemporaneously filed motion to dismiss certain claims in West's complaint is therefore denied, without prejudice, as moot.

JUDGMENT IN A CIVIL CASE

IT IS HEREBY ORDERED AND ADJUDGED that having determined that West's claims of discrimination against H & R Block are property of his bankruptcy estate, it is clear that he lacks standing to bring the present cause of action. Since West lacks standing, this court does not have subject matter jurisdiction over his claims, which must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(3). Based on the foregoing analysis, H & R Block's motion for summary judgment (12-1) is granted. H & R Block's contemporaneously filed motion to dismiss (9-1) certain claims in West's complaint is therefore denied, without prejudice, as moot.

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(Cite as: 1991 WL 77529 (Del.Ch.), 17 Del. J. Corp. L. 342)

H
UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Chancery of Delaware, New Castle County.

In re REXENE CORPORATION SHAREHOLDERS
LITIGATION.

J & S PACKAGING PROFIT SPLITTING PLAN,
Plaintiff,

v.

REXENE CORPORATION, William J. Gilliam,
Andrew J. Smith, Herman Rosenman, Peter
A. Joseph, Angus C. Littlejohn, Jr., Arthur L.
Goeschel, Andrew R. Heyer, John
D.R. Machin, Drexel Burnham Lambert,
Incorporated, El Paso Partners, L.P.,
Manchester Investment L.P., Biscayne Capital L.P.,
and the First Boston
Corporation, Defendants.

Civ. A. Nos. 10,897, 11,300.

Submitted: Jan. 15, 1991.

Decided: May 8, 1991.

****345** R. Bruce McNew, Pamela S. Tikellis, and
Carolyn D. Mack, Greenfield & Chimicles, Joseph A.
Rosenthal, and Kevin Gross, Morris, Rosenthal,
Monhait & Gross, P.A., Wilmington, of counsel:
Richard D. Greenfield, Greenfield & Chimicles,
Haverford, Pa., Joseph H. Weiss, and Kevin
Yourman, Law Offices of Joseph H. Weiss, New
York City, Arnold Levin, and Frederick S. Louger,
Levin, Fishbein, Sedran & Berman, Philadelphia, Pa.,
for plaintiffs.

A. Gilchrist Sparks, III, and Robert J. Valihura, Jr.,
Morris, Nichols, Arsh & Tunnell, Wilmington, of
counsel: George M. Newcombe, William A. Maher,
and David B. Smallman, Simpson Thacher &
Bartlett, New York City, for individual defendants
and for El Paso Partners, L.P.

Lawrence C. Ashby, and Stephen E. Jenkins, Ashby,
McKelvie & Geddes, Wilmington, for Rexene
Corporation.

Robert K. Payson, and James F. Burnett, Potter

Anderson & Corroon, Wilmington, of counsel:
Theodore N. Miller, and Alan M. Unger, Sidley &
Austin, Chicago, Ill., for Manchester Investments,
L.P. and Biscayne Capital L.P.

E. Norman Veasey, and C. Stephen Bigler, Richards,
Layton & Finger, Wilmington, of counsel: Howard
G. Sloane, Cahill Gordon & Reindel, New York City,
for Drexel Burnham Lambert, Incorporated.

Craig B. Smith, and Vicki A. Hagel, Lassen, Smith,
Katzenstein & Furlow, Wilmington, of counsel:
Michael A. Cooper, and Robert A. Sacks, Sullivan &
Cromwell, New York City, for The First Boston
Corporation.

MEMORANDUM OPINION

BERGER, Vice Chancellor.

***1 **346** This is an action filed by minority
stockholders of Rexene Corporation ("Rexene")
challenging a recapitalization plan that included,
among other things, the payment of a \$7.00 per share
special dividend. In their ten count Amended
Complaint (the "Complaint"), plaintiffs charge
Rexene's directors with waste, self-dealing and
breach of the duty of candor. In addition, the
Complaint alleges that Drexel Burnham Lambert Inc.
("Drexel") and three limited partnerships that
participated in the debt placement and structuring of
the recapitalization aided and abetted breaches of
fiduciary duty by Rexene's directors. Finally, the
Complaint charges defendants with violations of § §
11 and 15 of the Securities Act of 1933 in connection
with the dissemination of the prospectus for a public
offering of Rexene common stock. Defendants
moved to dismiss on a variety of grounds including
failure to make demand and failure to state a claim.
For the reasons that follow, defendants' motions are
granted.

The relevant facts, as alleged in the Complaint, may
be summarized as follows. Rexene, through its
subsidiaries, manufactures and markets thermoplastic
and petrochemical products. On April 13, 1988,
several of the defendants acquired Rexene in a
leveraged buyout for \$456 million. The buyout
group was led by three limited partnerships: El Paso
Partners, L.P. ("El Paso") and two partnerships

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affiliated with Drexel, Manchester Investments, L.P. ("Manchester") and Biscayne Capital L.P. ("Biscayne"). The three partnerships contributed only \$6 million of the \$456 million paid in the leveraged buyout and received 24 million shares of Rexene common stock.

On April 19, 1988, approximately \$200 million of bridge financing for the leveraged buyout was repaid by the issuance of \$100 million principal amount of Senior Subordinated Extendable Notes (the "Extendable Notes"), \$75 million principal amount of Subordinated Notes (the "Subordinated Notes") and \$34 million of redeemable preferred stock. Both the Extendable Notes and the Subordinated Notes limited Rexene's ability to pay dividends.

On August 4, 1988, Rexene issued 6 million additional shares of common stock, representing approximately 20% of the company's outstanding common stock, in an initial public offering (the "Public Offering") at \$21.50 per share. Defendant, The First Boston Corporation ("First Boston") acted as lead underwriter and, pursuant to an over-allotment option, purchased 900,000 shares of Rexene common stock at the discounted price of \$20.00 per share. Manchester, Biscayne and El Paso did not sell any of their shares in the Public Offering and agreed with First Boston that they would not sell their Rexene common stock on the open market for two years. **347 Rexene raised approximately \$156 million in the Public Offering, which was used to reduce the company's outstanding bank debt.

In November, 1988, Rexene entered into negotiations with Sunshine Mining Company ("Sunshine") for the acquisition of Rexene by Sunshine. The two companies executed a non-binding letter of intent in late December, 1988, pursuant to which Sunshine was to acquire Rexene for approximately \$865 million, or \$28.00 per share. However, on January 31, 1989, Rexene and Sunshine terminated their negotiations. In a press release announcing the end of negotiations with Sunshine, Rexene stated that it would continue "to work with its financial advisers on various ways to maximize shareholder values." Complaint, ¶ 19.

*2 In March and April, 1989, Rexene retired the Extendable Notes and the Subordinated Notes, thereby removing the restrictions on payment of dividends that had been included in the relevant debt instruments. The challenged special dividend was approved on June 5, 1989, as part of Rexene's recapitalization plan. That plan included: (1) a

private placement of \$500 million in increasing rate notes (the "Increasing Rate Notes"), (2) payment of a special dividend of \$7.00 per share (the "Special Dividend"), (3) an increase in the quarterly dividend from \$0.15 to \$0.25 per share, and (4) the sale of certain Rexene assets. The Increasing Rate Notes were placed through Drexel by July 7, 1989 and, by the end of that month, both the increased quarterly dividend and the Special Dividend, totaling approximately \$224 million were paid.

Another quarterly dividend of \$0.25 per share was paid on October 16, 1989. However, by year end, Rexene decided to suspend payment of the quarterly dividend. The announced reason for that decision was that petrochemical prices were lower than expected. During the year between the termination of the Sunshine negotiations and the suspension of the quarterly dividend, the price of Rexene common stock had been dropping and, by mid-January, 1990, it was trading at \$2.50 per share.

The gravamen of the Complaint is that the recapitalization plan, particularly the Special Dividend, was designed to benefit the original leveraged buyout participants at the expense of the public minority stockholders. Plaintiffs complain that defendants used the proceeds of the Public Offering to pay themselves a special dividend, which represented a significant return on their investment but financially crippled the company. As noted at the outset, the Complaint purports to state a variety of claims, including waste and breach of fiduciary **348 duty. Several of those claims are included twice; Once as derivative claims and once as class actions.

In addition, the Complaint raises two disclosure claims. Plaintiffs allege that defendant directors and First Boston violated the Federal Securities Act of 1933 by, among other things, failing to disclose in the prospectus for the Public Offering that the directors had a plan to pay the Special Dividend with the proceeds from the Public Offering. Defendant directors also allegedly breached their common law fiduciary duty of candor by failing to disclose the same "plan."

The first issue is whether the waste and self-dealing claims may be brought directly, derivatively or both. Although the tests have been articulated many times, it is often difficult to distinguish between a derivative and an individual action. The determination is based upon the allegations in the complaint, not plaintiffs' characterization of their claims. Where the

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corporation is harmed by alleged wrongdoing and the stockholders are indirectly injured, the claim is derivative in nature. *Kramer v. Western Pacific Indus.*, Del.Supr., 546 A.2d 348, 353 (1988). By contrast, a stockholder has an individual claim when he sustains a "special injury," that is, "either 'an injury which is separate and distinct from that suffered by other shareholders,' or a wrong involving a contractual right of a shareholder ... which exists independently of any right of the corporation." *Moran v. Household Intern'l, Inc.*, Del.Ch., 490 A.2d 1059, 1070, *aff'd* Del.Supr., 500 A.2d 1346 (1985). (Quoting 12B *Fletcher Cyclopaedia Corps*, § 5291, at 451 (Perm.Ed 1984) (Citations omitted). See also *Bokat v. Getty Oil Co.*, Del.Supr., 262 A.2d 246, 249 (1970) (to bring an individual action, plaintiff must be injured directly or independently of the corporation).

*3 Using these standards, claims of waste, self-dealing and improper payment of excessive dividends have been held to be derivative and not individual. See *Kramer v. Western Pacific Indus.*, 546 A.2d at 353; *Sinclair Oil Corp. v. Levien*, Del.Supr., 280 A.2d 717, 721-22 (1971). Thus, it would seem that plaintiffs' purported class claims, which allege waste, self-dealing and the improper payment of an excessive dividend should be dismissed because they are, in fact, derivative claims. See *Good v. Texaco, Inc.*, Del.Ch., Civil Action No. 7501, Brown, C. (May 14, 1984).

Plaintiffs urge the Court to rule otherwise on the theory that the Special Dividend, although proportional in nature, impacted the company's stockholders differently. The public minority stockholders, such as plaintiffs, allegedly were injured by the Special Dividend whereas the defendant stockholders, having invested at \$0.25 per **349 share, were benefitted by the \$7.00 dividend. The problem with this argument is that the injury, if any, did not result from the receipt of a large cash dividend. Rather, the effect of the Special Dividend on the financial condition of the company is the source of the injury. If, as plaintiffs say, Rexene was crippled by the Special Dividend, Rexene's stockholders were injured indirectly and may only bring a derivative action to seek redress for the alleged wrong.

As previously noted, the same waste and breach of fiduciary duty claims were also brought derivatively. The analysis from this perspective focuses on whether the Complaint adequately alleges demand futility under *Chancery Court Rule 23.1*. The

applicable test is well settled:

(1) [W]hether threshold presumptions of director disinterest or independence are rebutted by well-pleaded facts; and, if not, (2) whether the complaint pleads particularized facts sufficient to create a reasonable doubt that the challenged transaction was the product of a valid exercise of business judgment.

Levine v. Smith, Del.Supr., --- A.2d --- No. 518, 1989, slip op. at 24-25 (May 1, 1991). See *Aronson v. Lewis*, Del.Supr., 473 A.2d 805, 814 (1984).

Plaintiffs allege that a majority of defendant directors had a disabling interest in the recapitalization plan because they were anxious to obtain a cash return on their investment. Therefore, according to plaintiffs, the Special Dividend and the increased quarterly dividend were timed and structured to benefit defendants at the expense of Rexene and the minority stockholders. Again, plaintiffs would have this Court ignore the fact that defendant directors received the same cash dividend in the same amount per share as all other Rexene stockholders. The fact that defendants own a substantial number of shares does not make them interested. See *Sinclair*, 280 A.2d at 721- 22; *Hannigan v. Italo Petroleum Corp. of America*, Del.Supr., 77 A.2d 209, 212 (1949).

Alternatively, plaintiffs argue that demand was excused under the second prong of the *Aronson* standard. They say that payment of the Special Dividend under the circumstances alleged creates a reasonable doubt as to defendant directors' good faith. In addition, they contend that, where a complaint alleges waste of corporate assets, the waste claim creates a reasonable doubt that the transaction is subject to the protections of the business judgment rule. The Complaint, however, does not adequately support either assertion.

*4 **350 Bad faith will be inferred where "the decision is so beyond the bounds of reasonable judgment that it seems essentially inexplicable on any [other] ground...." *In re J.P. Stevens & Co., Inc. Shareholders Litigation*, Del.Ch., 542 A.2d 770, 780 (1988). The recapitalization plan under attack is readily explainable. Defendant directors told the stockholders that they were attempting to maximize shareholder values. A large cash dividend is sometimes used to accomplish that result. Whether the Special Dividend was too large, as plaintiffs contend, is open to debate. It did not, apparently,

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violate 8 *Del.Ch.* § 170, nor did it force Rexene into bankruptcy. Thus, I do not find that the Complaint creates a reasonable doubt as to defendant directors' good faith.

The waste claim is similarly deficient. Where a transaction is attacked, it will be invalidated as a waste of corporate assets if, "what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid." *Saxe v. Brady*, Del.Ch., 184 A.2d 602, 610 (1962). Where, as here, it is a dividend that is under attack, the size of the dividend can not be compared to any amount received by the corporation and the test for waste of corporate assets appears to be the same as that for bad faith. Thus, for the reasons discussed above, I conclude that the Complaint does not create a reasonable doubt that defendants committed waste of corporate assets.

Based on the foregoing, Counts I-VI, VIII and IX must be dismissed. These counts include the claims that were brought as class actions, but were found to state only derivative claims, and the derivative claims, which did not satisfy the requirements of *Chancery Court Rule 23.1*. In addition, the aiding and abetting claims must be dismissed since they depend upon the failed breach of fiduciary duty claims.

The disclosure claims remain to be addressed. In Count VII, plaintiffs complain that defendant directors misled Rexene's public stockholders by repeatedly stating that they were working to maximize stockholder values. The Complaint alleges that the directors failed to disclose their true intent, which was to maximize their own return without regard to the public stockholders. Defendants argue that there is no duty of candor to be breached unless the directors are required or elect to seek stockholder action. Here, there were no decisions for the stockholders to make with respect to the Special Dividend or any other aspect of the recapitalization plan. Alternatively, defendants argue that the duty of candor, if applicable, does **351 not require directors to confess wrongdoing or otherwise explain their motivation.

Defendants' second argument is well founded. Directors are not required to engage in self-flagellation and the failure to make an admission of wrongdoing "is not a material omission even if plaintiff is able to prove director malfeasance." *Margolies v. Pope and Talbot, Inc.*, Del.Ch., Civil

Action No. 8244, Hartnett, V.C. at 17 (December 23, 1986); see *Seibert v. Harper & Rowe Pub., Inc.*, Del.Ch., Civil Action No. 6639, Berger, V.C. at 15-16 (December 5, 1984). Thus, I find that even if the duty of candor applies to "voluntary" disclosures [FN1], the alleged non-disclosures here are not actionable.

*5 The other disclosure claims are set forth in Count X and allegedly constitute violations of § § 11 and 15 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § § 77K and 77o. The Complaint alleges that the prospectus issued in connection with the Public Offering contained the following untrue statements of material fact and/or omissions of material fact: (1) it failed to disclose defendants' plan to extract a cash payout in the form of the Special Dividend; and (2) it falsely states that an action brought by employees of the company (the "Employee Class Action") lacked merit.

These disclosure allegations must be dismissed for failure to state a claim. With respect to the alleged "plan," there is no requirement that intentions be disclosed. *Rodman v. Grant Foundation*, 608 F.2d 64 (2nd Cir.1979); *Golub v. PPD Corp.*, 576 F.2d 759 (8th Cir.1978). Moreover, the Complaint does not even allege facts from which it could be inferred that such a plan existed at the time the prospectus was issued. To the contrary, the fact that defendants were negotiating an acquisition with Sunshine in December, 1988, strongly suggests that any plan for a recapitalization and Special Dividend did not arise until after those negotiations fell through at the end of January, 1989.

The disclosure allegations relating to the Employee Class Action are equally weak. The prospectus discusses the nature of the Employee Class Action and then states:

**352 No discovery of documents or the parties has commenced in this purported class action. However, based upon the investigation conducted by the Company to date, the Company believes that the litigation lacks merit and that the facts do not substantiate plaintiffs' claim.... The Company believes that this litigation will not have a material adverse effect on the Company's financial position or results of operations. However, no assurances can be given that this action will not have such an effect.

July 29, 1988 Prospectus, 39-40; Complaint, ¶ 84E. Plaintiffs allege that this disclosure was false since the lawsuit was settled for \$95 million within a few

Not Reported in A.2d

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days after the entry of a temporary restraining order.

The fact that the Employee Class Action was settled for \$95 million months after the prospectus was issued does not indicate that any of the above quoted statements in the prospectus were false when made. The lawsuit had just been filed one month before the prospectus was issued, there had been no discovery and the disclosure expressly alerted investors to the fact that no assurances could be given as to the outcome of the litigation. In sum, the Complaint fails to allege any facts demonstrating that the disclosures were false. The fact that the company's prediction as to the merits of the suit may have been wrong does not mean that there were any disclosure violations.

Defendants' motions to dismiss the Complaint are granted.

IT IS SO ORDERED.

FN1. The Court is not ruling on this question at present. However, defendants' approach is problematic. The idea that directors are permitted to be less than fully candid with their stockholders about the condition of the company seems inconsistent with the standards expected of corporate fiduciaries. See *Loft, Inc. v. Guth*, Del.Ch., 2 A.2d 225 (1938), *aff'd* Del.Supr., 5 A.2d 503 (1939).

1991 WL 77529 (Del.Ch.), Fed. Sec. L. Rep. P 96,010, 17 Del. J. Corp. L. 342

END OF DOCUMENT

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:)	Chapter 11
)	
UAL CORPORATION, et al.,)	Joint Case No. 02 B 48191
)	
Debtors.)	
)	
<hr/> OURHOUSE, INC.,)	Honorable Eugene R. Wedoff
)	
Plaintiff,)	
)	
v.)	
)	Adversary No. 04 A 2086
UAL CORPORATION, AIR WIS SERVICES,)	
INC., AIR WISCONSIN, INC., BIZJET)	
CHARTER, INC., BIZJET FRACTIONAL, INC.,)	
BIZJET SERVICES, INC., CONFETTI, INC.,)	
CYBERGOLD, INC., DOMICILE)	
MANAGEMENT SERVICES, INC., FOUR STAR)	
LEASING, INC., ITARGET.COM, INC., KION)	
LEASING, INC., MILEAGE PLUS HOLDINGS,)	
INC., MILEAGE PLUS MARKETING, INC.,)	
MILEAGE PLUS, INC., MYPPOINTS OFFLINE)	
SERVICES, INC., MYPPOINTS.COM, INC.,)	
PREMIER MEETING AND TRAVEL)	
SERVICES, INC., UAL BENEFITS)	
MANAGEMENT, INC., UAL COMPANY)	
SERVICES, INC., UAL LOYALTY SERVICES,)	
INC., UNITED AIR LINES, INC., UNITED)	
AVIATION FUELS CORPORATION, UNITED)	
BIZJET HOLDINGS, INC., UNITED COGEN,)	
INC., UNITED GHS INC., UNITED)	
VACATIONS, INC., UNITED WORLDWIDE)	
CORPORATION, FREDERIC F. BRACE,)	
DOUGLAS A. HACKER, FRANCESCA M.)	
MAHER, RICHARD J. POULTON, SCOTT M.)	
PRAVEN, STEVEN M. RASHER, ROBERT B.)	
SAHADEVAN, and the OFFICIAL COMMITTEE)	
OF UNSECURED CREDITORS OF UAL)	
CORPORATION and each of its jointly-)	
administered debtors,)	
)	
Defendants.)	

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
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PRAVEN, STEVEN M. RASHER, ROBERT B.)	
SAHADEVAN, and the OFFICIAL COMMITTEE)	
OF UNSECURED CREDITORS OF UAL)	
CORPORATION and each of its jointly-)	
administered debtors,)	
)	
Defendants.)	

**RULE 9011 CERTIFICATION REGARDING
REQUEST FOR EMERGENCY HEARING**

I, Marc Kieselstein, of the law firm of Kirkland & Ellis and a member of the Bar of this Court, hereby certify as follows:

1. I caused to be filed the Debtors' Emergency Motion (the "Motion") to Dismiss Counts IV and V relating to adversary number 04 A 2086, filed by OurHouse, Inc..
2. I have carefully examined the matter, and have determined that there is a true necessity for an emergency hearing.
3. On April 15, 2004 OurHouse served Debtors' counsel with an adversary complaint against, among others, the Debtors and certain officers and directors (the D&O's) of UAL Loyalty Services, Inc. ("ULS"), Case No. 04 A 02086.
4. Certain senior officers and directors of the Debtors who are intimately involved in the Debtors' restructuring efforts and day to day operations and who also may be required to testify in the April 26, 2004 trial on OurHouse's disputed claim are identified as defendants in Counts IV and V of OurHouse's complaint. Continued pursuit of Counts IV and V of OurHouse's complaint, thus, threatens to create a severe distraction of and disruption to the efforts of such individuals to assist in the Debtors' restructuring and was clearly timed to intimidate potential witnesses at trial in an effort to create settlement leverage. The Debtors believe that it is absolutely appropriate that the Debtors attempt to bring an immediate stop to the unnecessary distraction and harassment of its directors and officers. Consequently, the Debtors have requested this Motion be heard April 26, 2004, at 9:30 a.m.
5. The Debtors believe that it is in the best interests of their creditors and respective estates that a hearing on approving the requested transfer, be scheduled on an emergency basis.

6. In accordance with Local Bankruptcy Rule 306, the Emergency Motion is of such a nature that any delay in hearing would result in serious, irreparable harm to the Debtors.

Dated: Chicago, Illinois
April 23, 2004

Respectfully submitted,

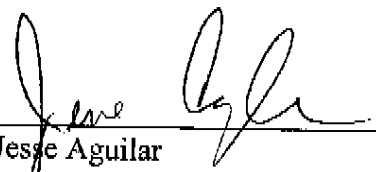


James H.M. Sprayregen, P.C. (ARDC No. 6190206)
Marc Kieselstein, Esq. (ARDC No. 6199255)
David R. Seligman, Esq. (ARDC No. 6238064)
Salvatore F. Bianca, Esq. (ARDC No. 6278974)
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000 (telephone)
(312) 861-2200 (facsimile)
Counsel for the Debtors and Debtors in Possession

CERTIFICATE OF SERVICE

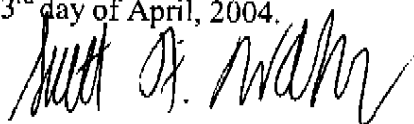
I, Jesse Aguilar, a non attorney, certify that on the 23rd day of April, 2004, I caused to be served, by e-mail (to parties who have provided an e-mail address), facsimile (to parties who have not provided an e-mail address) and by overnight delivery (to all parties who have not provided an e-mail address or a facsimile number), a true and correct copy of the foregoing **Debtors' Emergency Motion to Dismiss Counts IV and V**, on the parties on the attached service list.

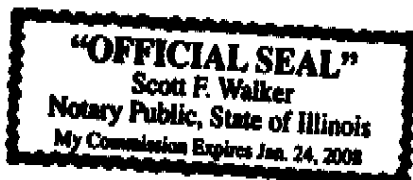
Dated: April 23, 2004



Jesse Aguilar

Subscribed and sworn to before me
this 23rd day of April, 2004.





CORE GROUP SERVICE LIST

Debtors: United Air Lines, Inc. WHQLD 1200 East Algonquin Road Elk Grove Village, Illinois 60007 Attn: John Lakosil Phone: (847) 700-4462 Facsimile: (847) 700-4683	Counsel to Debtors and Debtors in Possession: Kirkland & Ellis 200 East Randolph Street Chicago, Illinois 60601 Attn: James H.M. Sprayregen, P.C. Marc Kieselstein David R. Seligman Steven Kotarba Phone: (312) 861-2000 Facsimile: (312) 861-2200
Office of the United States Trustee: 227 West Monroe Street, Suite 3350 Chicago, Illinois 60606 Attn: Stephen Wolfe Phone: (312) 886-5785 Facsimile: (312) 886-5794	Counsel to the Debtors' debtor in possession lender (Bank One): Latham & Watkins 233 South Wacker Drive, Suite 5800 Chicago, Illinois 60606 Attn: David Heller Timothy Barnes Phone: (312) 876-7700 Facsimile: (312) 993-9767
Counsel to the Debtors' debtor in possession lender (CIT Group): Schulte, Roth & Zabel 919 Third Avenue New York, New York 10022 Attn: Robert J. Mrofka Phone: (212) 756-2000 Facsimile: (212) 593-5955	Counsel to the Debtors' debtor in possession lender (Citibank and JP Morgan): Morgan, Lewis & Bockius, LLP 101 Park Avenue New York, New York 10178 Attn: Richard S. Toder Jay Teitelbaum Phone: (212) 309-6000 Facsimile: (212) 309-6001
Counsel to the Debtors' debtor in possession lender (Citibank and JP Morgan): Kaye Scholer, LLP 3 First National Plaza, Suite 4100 70 West Madison Street Chicago, Illinois 60602 Attn: Michael B. Solow Phone: (312) 583-2300 Facsimile: (312) 583-2360	Debtors' Private Copy Service: Merrill Corporation 250 South Wacker Drive, 4th Floor Chicago, Illinois 60606 Attn: Patrick Finnerty Phone: (312) 786-6300 Facsimile: (312) 930-5986
Official Notice and Claims Agent: Poorman-Douglas Corporation 10300 SW Allen Boulevard Beaverton, Oregon 97005 Attn: Rhonda G. McNally Phone: (503) 277-7999 Facsimile: (503) 350-5230	Counsel to Committee: Sonnenschein, Nath & Rosenthal 8000 Sears Tower 233 S. Wacker Drive Chicago, Illinois 60604 Attn: Fruman Jacobson Robert E. Richards Phone: (312) 876-8123 Facsimile: (312) 876-7934
Counsel to Committee: Sonnenschein, Nath & Rosenthal 1221 Avenue of the Americas 24th Floor New York, New York 10020 Attn: Carole Neville Phone: (212) 768-6889 Facsimile: (212) 768-6800	

In re UAL Corporation, et al.

Case No. 02-B-48191

Northern District of Illinois, Eastern Division

Mark E. Abraham

Gould & Ratner
222 North LaSalle Street Suite 800
Chicago, IL 60601-1085
Fax: 3122303241; Email: mabraham@gouldratner.com
Counsel for: U.S. Bank N.A.

Francisco L. Acevedo Nogueiras

Department of Transportation
P.O. Box 9023005
San Juan, PR 00902-3805
Fax: 7879773773; Email: f.acevedo@yahoo.com
Counsel for: Commonwealth of Puerto Rico

Ann Acker, Esq.

Chapman and Cutler
111 W. Monroe Street
Chicago, IL 60603
Fax: (312) 701-2301; Email: spedlit@chapman.com
Counsel for: Wells Fargo Bank Northwest, NA
Pacific Investment Management Co. LLC
Reams Asset Management Co. LLC
Metropolitan West Asset Management LLC

Denise Adamucci

Klett Rooney Lieber & Schorling
Two Logan Square, 12th Floor 18th and Arch Streets
Philadelphia, PA 19103-2756
Fax: 2155612131; Email: dadamucci@klettrooney.com
Counsel for: PNC Bank, National Association

Howard L. Adelman

Adelman, Gettleman, Morens, Berish & Carter, Ltd.
53 West Jackson Blvd; Ste. 1050
Chicago, IL 60604
Fax: 3124351098; Email: hla@agmbs.com
Counsel for: Mitsui & Co. Ltd.; UGT Kumiai
Sumitomo Corporation
Mitsui & Co. International (Europe)
Marubeni America Corporation
Wells Fargo Bank Northwest, NA

David G. Aelvoet

Lineberger Goggan Ulmer & Sampson, LLP
711 Navarro, Suite 300
San Antonio, TX 78205
Fax: (210) 225-8410; Email: sven@linebergerbankruptcy.com
Counsel for: Bexar County
Tarrant County
Dallas County

Jesse Aguilar

Kirkland & Ellis
Aon Building 200 E. Randolph Drive
Chicago, IL 60601
Fax: ; Email: jaguilar@kirkland.com
Counsel for: UAL Corp.

Robert D. Albergotti

Haynes and Boone, LLP
800 Main Street, Suite 3100
Dallas, TX 75202
Fax: 2142000350; Email: robert.albergotti@haynesboone.com
Counsel for: American Airlines, Inc.

Peter B. Alderman, Esq.

Debevoise & Plimpton LLP
818 Third Ave
New York, NY 10022
Fax: (212) 809-6038; Email: phaldern@debbevoise.com
Counsel for: John Hancock Life Insurance Co.

R. Scott Alsterda

Ungaretti & Harris
3500 Three First National Plaza
Chicago, IL 60602
Fax: (312) 877-4405; Email: rsalsterda@uhl.com
Counsel for: Heathcote Service Corp
City & County of San Francisco
Denver International Airport

Jonathan B. Alter

Bingham McCutchen LLP
One State Street
Hartford, CT 06103
Fax: (860) 240-2800; Email: jonathan.alter@bingham.com
Counsel for: Travelers Security & Surety Company
Travelers Indemnity Company

George Alvord

Gate Gourmet Inc.
5100 Poplar Ave.
Memphis, TN 38137
Fax: (901) 765-3110; Email: gelvord@gategourmet.com
Counsel for: Gate Gourmet Inc.

Jerald I. Ancel

Summer Bernard Ackerson, PC
4000 Bank One Tower 111 Monument Circle
Indianapolis, IN 46204
Fax: (317) 236-9802; Email: jancel@sbolawyers.com
Counsel for: City of Indianapolis

Margaret M. Anderson

Lord Bissell & Brook
115 S. LaSalle Street Suites 2600-3000
Chicago, IL 60603
Fax: (312) 443-0330; Email: panderson@lordbissell.com
Counsel for: United States Aviation Underwriters, Inc.
Blue Cross and Blue Shield of Florida, Inc.

Bill Angelowitz

Daily Insights
JAI Box 312/
New York, NY 10116
Fax: (212) 714-8827; Email: wangelow@keecapital.com
Counsel for: Daily Insights

Jonathan Y. Arnason

Vedder, Price, Kaufman & Karmatzholz
805 Third Avenue
New York, NY 10022
Fax: (212) 407-7784; Email: jarnason@vedderprice.com
Counsel for: UAL Corporation

Adrian S. Baer

Andrews & Knuth
600 Travis Suite 4200
Houston, TX 77002
Fax: 7132204285; Email: andbaer@aklp.com
Counsel for: Kinder Morgan Energy Partners LLC

Kathy Bailey

Bailey Law Group, P.C.
1752 N Street, NW Suite 800
Washington, DC 20036
Fax: 2026678044; Email: kbailey@baileylawgroup.com
Counsel for: HMMH Corporation
Host International Inc.

Marian Baldwin

Chadbourne & Parke LLP
30 Rockefeller Plaza
New York, NY 10112
Fax: 8467105231; Email: mbaldwin@chadbourne.com
Counsel for: Citibank PrivatKunden AG

Elizabeth Banda

Purdue Brandon Fielder Collins & Mott, LLP
P.O. Box 13430
Arlington, TX 76004-0430
Fax: (817) 860-8500; Email: ebanda@pbfcmm.com
Counsel for: Grapevine Collegeville I.S.D.
City of Grapevine (Texas)

Mark Bane

Kelley, Drye & Warren, LLP
101 Park Avenue
New York, NY 10178
Fax: (212) 808-7807; Email: MBane@KelleyDrye.com
Counsel for: Pension Benefit Guaranty Corporation

Terence G. Banich, II

Jernini & Block, LLC
One IUM Plaza
Chicago, IL 60611-2801
Fax: (312) 940-8704; Email: tbanich@jernini.com
Counsel for: Midwest Properties - Chicago, LLC

Mariana Baquero

Mayer Brown Fenn & Maw LLP
1076 Broadway
New York, NY 10019
Fax: (212) 849-5614; Email: mbaquero@mayerbrown.com
Counsel for: ABN-AMRO Bank, NV

Ronald E. Barab

Smith, Gambrell & Russell, LLP
Promenade II Suite 3100 1230 Peachtree Street, NE
Atlanta, GA 30309
Fax: (404) 815-3500; Email: rbarab@sgriaw.com
Counsel for: American State Bank

William Barbour

Public Service Resources Corp.
80 Park Plaza, T 22
Newark, NJ 07102-4194
Fax: 9734583509, Email: william.barbour@psrc.com
Counsel for: N054UA

Barbara Barnett

Sonnenschein, Nath & Rosenthal LLP
8000 Swamp Tower 233 S. Wacker Drive
Chicago, IL 60608
Fax: 3125767934; Email: babarnett@sonnenschein.com
Counsel for: Creditors Committee

Timothy M. Barry, Senior Deputy

County of San Diego
1000 Pacific Highway, Room 355
San Diego, CA 92101
Fax: 6195318065; Email: timothy.barry@sdcounty.ca.gov
Counsel for: County of San Diego

W. Robinson Beard

Stites & Harrison, PLLC
400 West Market Street
Louisville, KY 40202
Fax: (502) 587-6391; Email: wbeard@stites.com
Counsel for: Regional Airport Auth of Louisville/Jefferson City
Lexington-Fayette Urban Airport Board

Edith J. Benay

Attorney at Law
345 Franklin Street
San Francisco, CA 94102
Fax: 4152520418; Email: ebenay@cs.com
Counsel for: Frank, et al.

Brad A. Berish

Adelman, Gettleman, Merens, Berish & Carter, Ltd.
53 W. Jackson Blvd
Chicago, IL 60604
Fax: (312) 435-1060; Email: bberish@agmbc.com
Counsel for: Travelers Casualty & Surety Company
Travelers Indemnity Company

Jeffrey Bernstein

Carpenter, Bennett & Monixay
Three Gateway Center 100 Mulberry Street
Newark, NJ 07102
Fax: (973) 822-5314; Email: jbn@carben.com
Counsel for: New Jersey Self Insurers Guaranty Assn.

Thomas E. Biron

Blank, Rome, Comisky & McCauley, LLP
One Logan Square
Philadelphia, PA 19103-6898
Fax: (215) 832-5682; Email: tbiron@blankrome.com
Counsel for: Creditors Committee

David H. Botter

Akin, Gump, Strauss, Hauer & Feld, LLP
500 Madison Ave.
New York, NY 10022
Fax: (212) 872-1002; Email: dbotter@akingump.com
Counsel for: Ad Hoc Committee of Holders of EETC and LTC
Ad Hoc Committee of Noteholders

Ronald Barliant

Goldberg, Kohn, Bell, Black, Roundbloom & Monte, Ltd.
55 East Monroe Street Suite 3700
Chicago, IL 60603
Fax: 3123321206; Email: ronald.barliant@goldbergkohn.com
Counsel for: State Street Bank & Trust Co.
State Street Bank & Trust Co. of Connecticut

Robert E. Barrett

Arnold & Porter LLP
370 Seventeenth Street Suite 4500
Denver, CO 80202-1370
Fax: 3036320428; Email: robert_barrett@aporter.com
Counsel for: Gale Gourmet Inc.

Kathleen E. Barry

The House Company
10275 Little Patuxent Parkway
Columbia, MD 21044
Fax: 4109926392; Email: kbarry@thehousecompany.com
Counsel for: House Affiliate

Sharon M. Beausoleil-Mayer

Fulbright & Jaworski LLP
1301 McKinney, Suite 5100
Houston, TX 77010-3095
Fax: 7136515246; Email: sbeausoleil-mayer@fulbright.com
Counsel for: Chase Transportation
Chase Terminal
Motive
SOPUS
Shell Pipeline

Robert R. Benjamin

Benjamin Beneman & Brom, LLC
205 W. Randolph St. Ste. 2110
Chicago, IL 60606
Fax: 3124448088; Email: benjamin@bbblaw.com
Counsel for: Nancy Abbot, et al.

Mark A. Berkoff

Piper Rudnick
203 N. La Salle St. Suite 1800
Chicago, IL 60601-1298
Fax: (312) 238-7316; Email: mark.berkoff@piperudnick.com
Counsel for: Air Canada
Citibank PrivatKunden AG

Ezra I. Bialik, Esq.

The Port Authority of NY & NJ
Office of Milton H. Pascher Law Department 225 Park Ave. South, 13th Fl.
New York, NY 10003
Fax: (212) 495-3584; Email: ebialik@pascherjg.com
Counsel for: Port Authority of NY & NJ

Peter L. Borowitz, Esq.

Debevoise & Plimpton LLP
910 Third Ave.
New York, NY 10022
Fax: (212) 909-8830; Email: pborowitz@debvoise.com
Counsel for: John Hancock Life Insurance Co.

Morton R. Branzburg, Esq.

Klehr, Harrison, Harvey, Branzburg & Fliers LLP
280 South Broad St.
Philadelphia, PA 19102
Fax: (215) 588-8603; Email: mbranzburg@klehr.com
Counsel for: Philadelphia Department of Commerce

Timothy A. Barnes

Lettem & Watkins
Swiss Tower Suite 5800
Chicago, IL 60605
Fax: (312) 883-9787; Email: Timothy.Barnes@lw.com
Counsel for: Bank One, NA
Bank One Delaware, NA

William J. Barrett

Barack Farnazzano Kirshbaum
Perlman & Nagelberg LLC 333 West Wacker Drive, Suite 2700
Chicago, IL 60606
Fax: (312) 684-3160; Email: william.barrett@bfkpn.com
Counsel for: Delta Air Lines, Inc.
Environmental Resources Management, Inc.

Jeffrey A. Bartos

Guarieri, Edmond & Clayman, PC
1626 Massachusetts Ave., NW Suite 700
Washington, DC 20036-2243
Fax: (202) 624-7420; Email: jbartos@gedlaw.com
Counsel for: Association of Flight Attendants

David E. Beker

Schwartz Cooper Greenberger Kreuze
180 North LaSalle Street Suite 2700
Chicago, IL 60601
Fax: 3127828410; Email: dbaker@scgk.com
Counsel for: Allied Capital Corporation

James Bennett, President/CEO

Metropolitan Washington Airport Authority
1 Aviation Circle
Washington, DC 20001-0000
Fax: (703) 417-8040; Email: james.bennett@mwaa.com
Counsel for: Metropolitan Washington Airport Authority

Beverly A. Berneman

Benjamin Beneman & Brom, LLC
205 W. Randolph St. Ste. 2110
Chicago, IL 60606
Fax: 3124448088; Email: berneman@ben.com
Counsel for: Nancy Abbot, et al.

Evelyn H. Biery

Fulbright & Jaworski LLP
1301 McKinney, Suite 5100
Houston, TX 77010-3095
Fax: 7136515246; Email: ebiery@fulbright.com
Counsel for: Chase Transportation
Chase Terminal
Motive
SOPUS
Shell Pipeline

Elena Bosk

Zini & Associates
Professional Corporation 480 Park Avenue 21st Floor
New York, NY 10022
Fax: 2129811453; Email: elena.bosk@zinindassociates.com
Counsel for: Banco di Napoli

Vicki Braunagel

Denver Airport Revenue Fund City
Department of Aviation 8500 Park Blvd
Denver, CO 80240
Fax: (303) 342-2323; Email: Vicki.braunagel@diadenv.net
Counsel for: Denver Airport Revenue Fund City

Bernadette Brennan

Michael A. Cordozo, Corporate Counsel for NYC
100 Church Street
New York, NY 10007
Fax: ; Email: bbrennan@law.nyc.gov
Counsel for: City of New York

John M. Brom

Benjamin Beneman & Brom, LLC
205 W. Randolph St. Ste. 2110
Chicago, IL 60606
Fax: 3124449009; Email: brom@3blaw.com
Counsel for: Nancy Abbot, et al.

Michael P. Buck

Zini & Associates
Professional Corporation 460 Park Avenue 21st Floor
New York, NY 10022
Fax: 2129001453; Email: michael.buck@ziniandassociates.com
Counsel for: Banca di Napoli

Phil Burno

Wayne Hummer Investments
300 S. Wacker Drive
Chicago, IL 60606
Fax: 3124310704; Email: pburno@whummer.com
Counsel for: Wayne Hummer Investments

Gary Bush

Bank of New York, (The)
101 Barclay Street
New York, NY 10280
Fax: (212) 815-5131; Email: gbush@bankofny.com
Counsel for: Bank of New York

James Caldwell

IOS Capital, Inc.
Bankruptcy Administration 105 Capital, LLC 1738 Usser Road P.O. Box 1
Macon, GA 31208-3708
Fax: (478) 471-2304; Email: jcaldwell@ioson.com
Counsel for: IOS Capital, Inc.

Kurt M. Carlson

Tinkler & Wald, Ltd.
200 S. Wacker Dr. Suite 2000
Chicago, IL 60606
Fax: (312) 878-3818; Email: kcarlson@tinklerandwald.com
Counsel for: State Street Bank & Trust Co. (UAL ESOP)
Lehman Brothers Inc.
Detroit Edison; British Aircraft Interior Systems
Public Service Electric & Gas Co.
Commonwealth Edison Company

Steve Carter

Attorney General of Indiana
Indiana Government Center South Fifth Floor 402 West Washington Street
Indianapolis, IN 46204-2710
Fax: 3173270709; Email:
Counsel for: Indiana Department of Revenue

Debra Ceccotti

Morgan Stanley
750 7th Avenue 20th Floor
New York, NY 10019
Fax: (212) 762-0358; Email: debra.ceccotti@morganstanley.com
Counsel for: Morgan Stanley

Adam Brozine

Thelen Reid & Priest LLP
101 Second St., Ste. 1800
San Francisco, CA 94104-3811
Fax: 4153696977; Email: abrozine@thelenreid.com
Counsel for: California Self Insurers' Security Fund

Mark Broude, Esq.

Latham & Watkins
885 Third Ave.
New York, NY 10022
Fax: (212) 751-4804; Email: mark.broude@lw.com
Counsel for: ING Bank, NY
ING Leasing (Ireland)
BV Dublin Branch

Gregory W. Buhler, Esq.

Schnader Harrison Segal & Lewis LLP
140 Broadway Suite 2100
New York, NY 10005-0908
Fax: (212) 972-8708; Email: GBuhler@Schnader.com
Counsel for: C.I.F. Leasing

James Burshtyn, Assistant Attorney General

Comptroller of Public Accounts of Texas
Bankruptcy & Collections Division P.O. Box 12548
Austin, TX 78711-2548
Fax: ; Email: james.burshtyn@compt.state.tx.us
Counsel for: State of Texas

John Wm. Butler, Jr.

Skadden, Arps, Slate, Meagher & Flom LLP
333 W. Wacker Dr.
Chicago, IL 60608
Fax: (312) 407-8501; Email: jbutler@skadden.com
Counsel for: US Airways, Inc., MidAtlantic Airways Inc.
US Airways Group, Inc., US Airways Leasing
Allegheny Airlines, Inc., PSA Airlines, Inc.
Material Services Company, Inc.
Piedmont Airlines, Inc.

Sarah Campbell

White & Case LLP
1155 Avenue of the Americas
New York, NY 10039
Fax: (212) 354-8113; Email: scampbell@whitecase.com
Counsel for: Societe General
UFG Bank Limited, Chicago Branch
Aircraft Finance Parties

Marc Carmel

Kirkland & Ellis
200 East Randolph
Chicago, IL 60601
Fax: 3126000199; Email: mcarmel@kirkland.com
Counsel for: UAL Corp

William K. Carter

Coston & Fieldman
407 S. Dearborn St., Suite 600
Chicago, IL 60605
Fax: 3124277356; Email: wcarter@costonlaw.com
Counsel for: General Electric Capital Corporation

Babette A. Ceccotti

Cohen & Weiss & Simon, LLP
330 W. 42nd Street
New York, NY 10036-0070
Fax: (846) 473-8227; Email: bceccotti@cwssny.com
Counsel for: ALPA

Thomas Brichner

International Association of Machinists
9000 Machinists Place Suite 118 B
Upper Marlboro, MD 20772
Fax: 3019874591; Email: tbrichner@iamaw.org
Counsel for: IAM

Abraham Brustein

Dimonte & Lizak
210 W. Higgins Road
Park Ridge, IL 60068
Fax: 8476680623; Email: abrustein@dimonteandlizak.com
Counsel for: Advanced Roofing, Inc.

Gerard T. Bukowski, Vice President and General C

Burns & McDonnell Engineering Company, Inc.
9400 Ward Parkway
Kansas City, MO 64114-3310
Fax: 8168223413; Email: gbukows@burnsmcd.com
Counsel for: Burns & McDonnell, including
Burns & McDonnell Engineering Company, Inc.

Robert Bush

Geffner & Bush
3500 W. Olive Ave. Suite 1100
Burbank, CA 91505
Fax: (818) 973-3201; Email: rbush@geffner-bush.com
Counsel for: Int'l Assoc. of Machinists and Aerospace Workers

Susan R. Bye-Walsh

17918 Hurlidge Lane
Canyon Country, CA 91387
Fax: ; Email:
Counsel for

Timothy J. Carey, Esq.

Lovells
One IBM Plaza 330 N. Wacker Ave. Suite 1000
Chicago, IL 60611
Fax: (312) 932-1444; Email: tim.carey@lovells.com
Counsel for: Hukwa Dubhu Landes Bank Hessen-Thuringen Int'l

Jack J. Carriglio

Mackler Bulger & Tison
123 North Wacker Drive Suite 1800
Chicago, IL 60606
Fax: 3124747808; Email: jack.carriglio@mbtlaw.com
Counsel for: United Retired Pilots Benefit Protection
Association, an Illinois not-for-profit Corp.

Ben T. Caughey

Jon Miller
One American Square PO Box 82001
Indianapolis, IN 46282
Fax: (317) 592-4643; Email: ben.caughey@jonmiller.com
Counsel for: Indianapolis Airport Authority
Citizens Gas & Coke Utility

Erik Chalut

Kirkland & Ellis
200 E. Randolph Dr.
Chicago, IL 60601-0030
Fax: 3128012200; Email: erik.chalut@chicago.kirkland.com
Counsel for: UAL Corp.

George M. Choever

Kirkpatrick & Lockhart LLP
Henry W. Oliver Building, 535 Smithfield Street
Pittsburgh, PA 15222-2312
Fax: (412) 355-8501; Email: gchoever@kll.com
Counsel for: State Street Bank and Trust Co.

Anthony Chiofalo

Zini & Associates
Professional Corporation, 480 Park Avenue, 21st Floor
New York, NY 10022
Fax: 212 680 1453; Email: anthony.chiofalo@zinindassociates.com
Counsel for: Banco di Napoli

Eleftheria N. Chronas

Macoro & Associates, P.C.
One Thompson Square, Suite 301
Suite 301
Boston, MA 02129
Fax: 617 242 5506; Email: eno@macorolaw.com
Counsel for: OMV Associates, LP

Allison Clark

Merill Corp.
250 S. Wacker Dr., 4th Fl.
Chicago, IL 60606
Fax: (312) 785-9900; Email: allison.clark@merillcorp.com
Counsel for: Official Copy Service

Michael W. Coffield

Michael W. Coffield & Associates
77 West Wacker Drive, Suite 4800
Chicago, IL 60601
Fax: 312 444 0658; Email: miko@bigdoglaw.com
Counsel for: Jane Ehrmann Zeller, et al.

Stacy Coleman

LaSalle Bank National Association
135 S. LaSalle St., Suite 1400
Chicago, IL 60603
Fax: (312) 604-2298; Email: stacy.coleman@abnam.com
Counsel for: LaSalle Bank National Association

Robert A. Conrad

HSBC Bank USA
452 Fifth Avenue
New York, NY 10018
Fax: (712) 525-1368; Email: robert.conrad@us.hsbc.com
Counsel for: HSBC Bank USA

Theresa Cosmano

Theresa Cosmano
5529 N. Nardine
Chicago, IL 60656
Fax: , Email:
Counsel for: Kenneth Scott Justel

Gretchen Crawford, Assistant District Attorney

Oklahoma County Treasurer
320 Robert S. Kerr Room 307
Oklahoma City, OK 73102
Fax: 405 713 1518; Email: tammi@oklahomacounty.org
Counsel for: Oklahoma County Treasurer

Vincent A. D'Agostino

Lawstation Sandler, PC
85 Livingston Avenue
Roseland, NJ 07068
Fax: (973) 597-2545; Email: vladagostino@lawstation.com
Counsel for: AT&T Corp

Matthew W. Cheney, Esq.

Swidler, Berlin, Sheroff, Friedman, LLP
3000 K St., NW, Suite 300
Washington, DC 20007-5116
Fax: (202) 424-7043; Email: mwcheney@swidlaw.com
Counsel for: Koch Supply & Trading, LP

Edward P. Christian

Akin Gump Strauss Hauer & Field LLP
2020 Century Park East, Suite 2400
Los Angeles, CA 90067
Fax: 310 229 1001; Email: echristian@akingump.com
Counsel for: WestLB AG, Neue Westdeutsche Landesbank
Girunmtrnk, New York Branch

Paul E. Chronis

McDermott Will & Emery
227 West Monroe Street
Chicago, IL 60606-5048
Fax: 312 684 7700; Email: pchronis@mwe.com
Counsel for: Bank of New York

Robert S. Clayman

Guarfori, Edmond & Clayman, PC
1625 Massachusetts Ave., NW, Suite 700
Washington, DC 20036-2248
Fax: (202) 624-7420; Email: rclayman@geclaw.com
Counsel for: Association of Flight Attendants

Jeffrey B. Cohen

Pension Benefit Guaranty Corp.
Office of the General Counsel, 1200 K Street, NW, Suite 340
Washington, DC 20005-1026
Fax: (202) 328-4112; Email: cohen.jeffrey@pbgc.gov
Counsel for: Pension Benefit Guaranty Corporation

John Collen, Esq.

Duane Morris, LLC
227 West Monroe St., Suite 3400
Chicago, IL 60606
Fax: (312) 499-6701; Email: jcollen@duanemorris.com
Counsel for: Philadelphia Department of Commerce

Katherine Constantine, Esq.

Dorsey & Whitney LLP
5th South Sixth Street
Minneapolis, MN 55402-1408
Fax: (612) 340 2643; Email: constantine.katherine@dorseylaw.com
Counsel for: U.S. Bank National Association

Steven N. Cousins

Armstrong Teasdale LLP
Metropolitan Square, Suite 2600
St. Louis, MO 63102-2740
Fax: 314 821 9066; Email: scousins@armstrongteasdale.com
Counsel for: City of St. Louis
Lambert St. Louis International Airport

Leo T. Crowley

Pillsbury Winthrop LLP
1540 Broadway
New York, NY 10036
Fax: 212 851 5000; Email: lcrowley@pillsburywinthrop.com
Counsel for: Mitsui & Co. (USA), Inc.
Sumitomo Corporation
Mitsui & Co. International (Europe)
Marubeni America Corporation
Wells Fargo Bank Northwest, NA

Joffrey C. Dan

Dannen, Crane, Heyman & Simon
135 South LaSalle St., Suite 1540
Chicago, IL 60603-4287
Fax: (312) 641-1114; Email: jtdan@dannencrane.com
Counsel for: Florida Power and Light

Michael Chimitris, Assistant General Counsel

General Growth Management, Inc., as Agent
110 N. Wacker
Chicago, IL 60606
Fax: (312) 900-5093; Email: awarsh@generalgrowth.com
Counsel for: General Growth Management, Inc., as Agent

David C. Christian II

McDermott Will & Emery
227 West Monroe Street
Chicago, IL 60606
Fax: 312 684 7700; Email: dchristian@mwe.com
Counsel for: Bank of New York

Francis A. Citera

Greenberg Traurig, LLP
77 West Wacker Drive, Suite 2400
Chicago, IL 60601
Fax: 312 468 8435; Email: fcitera@gtllaw.com
Counsel for: City of Chicago

Nathan F. Coco

McDermott Will & Emery
227 West Monroe Street
Chicago, IL 60606
Fax: 312 684 7700; Email: ncoco@mwe.com
Counsel for: Bank of New York

Staurot M. Cohen

Prusker Ross LLP
1586 Broadway
New York, NY 10036-8289
Fax: 212 692 9000; Email: scstaur@prusker.com
Counsel for: V-NP Properties, LLC

Tom Combs

Morgan Stanley
750 7th Avenue, 20th Floor
New York, NY 10010
Fax: (212) 507-0478; Email: tom.combs@morganstanley.com
Counsel for: Morgan Stanley

Daniel G. Cortright

Joffe, Mangels, Butler & Marmaro LLP
Two Embarcadero Center, 8th Floor
San Francisco, CA 94111
Fax: 415 395 5584; Email: dgc@jmbm.com
Counsel for: Phoenix Leasing Incorporated

Eugene Crane

Dannen, Crane, Heyman & Simon
135 LaSalle Street # 1540
Chicago, IL 60603
Fax: (312) 641-7114; Email: ecrane@dannencrane.com
Counsel for: .

Frank Cummings

LeDuc, Lamb, Greene & MacRae, LLP
1875 Connecticut Avenue, NW
Washington, DC 20009-5728
Fax: 202 688 1102; Email: fcummings@lkgm.com
Counsel for: United Retired Pilots Benefit Protection

Michael J. D'Angelico

U.S. Bank National Association
One Federal Street, 3rd Floor, Mail Station: EX-MA FED
Boston, MA 02110
Fax: 617 606 6640; Email: michael.dangelico@usbank.com
Counsel for: U.S. Bank N.A.

Maria A. Dantas

LeBoeuf, Lamb, Greene & MacRae, LLP
One Riverfront Plaza
Newark, NJ 07102-5490
Fax: (973) 843-8111; Email: mdantas@lbgm.com
Counsel for: Wachovia Bank, N.A.
First Union National Bank

Duncan Darrow

Ornick, Hemming & Stockoff, LLP
688 Fifth Avenue
New York, NY 10103
Fax: 2125066151; Email: ddarrow@ornick.com
Counsel for: Retirement Systems of Alabama

Janet L. Davis

Department of Transportation
Airline Carrier Fitness Division, X-56 400 Seventh St., SW Room 6401
Washington, DC 20580
Fax: (202) 368-7838; Email: Janet.Davis@dwt.dot.gov
Counsel for: Department of Transportation

Stephen Demotto

GE Asset Management Incorporated
Two Union Square
Seattle, WA 98101-2341
Fax: 2065164678; Email: steve.demotto@corporate.ge.com
Counsel for: GE Asset Management Incorporated

George Diamantopoulos

Saham, Saham, Meltz & Petersen, LLP
11 Martine Ave. Suite 1450
White Plains, NY 10605-4025
Fax: ; Email:
Counsel for: Aircraft Mechanics Fraternal Association

Kirk D. Dillman

Hennigan, Bennett & Dorman LLP
601 South Figueroa Street Suite 3300
Los Angeles, CA 90017
Fax: 2136841234; Email: dillmank@hbdlawyers.com
Counsel for: HSBC Bank USA

Angela D. Dodd

Securities and Exchange Commission
Midwest Regional Office 175 W. Jackson Blvd. Suite 900
Chicago, IL 60604
Fax: (312) 353-7398; Email: doddad@sec.gov
Counsel for: Securities & Exchange Commission

James M. Donohue

Ausley & McDevlin
227 South Calhoun Street P.O. Box 391
Tallahassee, FL 32302
Fax: (850) 222-7580; Email: jdonohue@ausley.com
Counsel for: Florida Self-Insurers Guaranty Assn., Inc.

Sheri L. Drucker

Mayer Brown Rowe & Maw LLP
190 S. LaSalle Street
Chicago, IL 60603
Fax: ; Email: sdrucker@mayerbrownrowe.com
Counsel for: UAL Loyalty Services, Inc.

Jeanne P. Darcey

Palmer & Dodge, LLP
111 Huntington Ave.
Boston, MA 02189-7817
Fax: (617) 727-4420; Email: jdarcey@palmerdodge.com
Counsel for: State Street Bank & Trust Co.
State Street Bank & Trust Co. of Connecticut

Raniero D'Aversa, Jr.

Mayer Brown Rowe & Maw LLP
1875 Broadway
New York, NY 10010 5820
Fax: (212) 282-1910; Email: rjaversa@mayerbrownrowe.com
Counsel for: ARN-AMRO Bank, NV

Susan B. de Resendiz

Gardner, Canton & Douglas
101 N. Wacker Drive Suite 3700
Chicago, IL 60606-1888
Fax: 3125693213; Email: sdeResendiz@gcd.com
Counsel for: Airbus North America Holdings, Inc.

Andrew DeNatale

White & Case LLP
1155 Avenue of the Americas
New York, NY 10038
Fax: (212) 354-8113; Email: adenatale@whitecase.com
Counsel for: Societe General
Aircraft Finance Parties

Barry J. Dichter

Dinkelader, Winkensham & Taft
100 Malden Lane
New York, NY 10038
Fax: (212) 504-9088; Email: barry.dichter@dwt.com
Counsel for: Lehman Brothers Holdings, Inc.

John P. Dillman

Linberger Guggen Blair & Sampson, LLP
P.O. Box 3064
Houston, TX 77253-3064
Fax: (713) 844-3503; Email: houston_bankruptcy@publicans.com
Counsel for: Harris County
Houston ISD
City of Houston

Edward C. Dolan

Hogan & Hartson, LLP
Columbia Square 555 Thirteenth Street, N.W.
Washington, DC 20004-1109
Fax: (202) 837-5810; Email: eddolan@hhlaw.com
Counsel for: Eagle County Air Terminal Corporation

J. Patrick Donovan

Chief Assistant Corporation Counsel
City of Chicago 30 North LaSalle Street, Rm. 900
Chicago, IL 60602
Fax: (312) 744-5780; Email: pdonovan@cityofchicago.org
Counsel for: City of Chicago

David L. Dubrow

Arent Fox Kintner Plotkin & Kalin PLLC
1675 Broadway, 25th floor
New York, NY 10019
Fax: (212) 484-3090; Email: ddubrow@arentfox.com
Counsel for: Suntrust Bank
Vanguard Municipal Bond Funds

Steve Darnell

Pitney Bowes Credit Corporation
27 Waterview Drive
Shelton, CT 06484-4361
Fax: 2039224083; Email: steve.darnell@pb.com
Counsel for: Pitney Bowes Credit Corporation

Gregory E. Davidowitch

Association of Flight Attendants
8400 Shafer Court Suite 250
Rosemont, IL 60018
Fax: (847) 242-7180; Email: mecpresident@unitedafa.org
Counsel for: Association of Flight Attendants

William J. Delaney

Tillinghast Licht Perkins Smith & Cohen, LLC
10 Weybosset Street, Suite 1000
Providence, RI 02903
Fax: (401) 456-1210; Email: wjdelaney@tlslaw.com
Counsel for: Rhode Island Airport Commission

Michael K. Desmond

Fuglio & Silverman, PC
111 South LaSalle Street Suite 3800
Chicago, IL 60603
Fax: 3122514810; Email: mdesmond@flegal.com
Counsel for: Brinkley & Partners

Chris L. Dickerson

Skadden, Arps, Slate, Meagher & Flom LLP
333 W. Wacker Dr.
Chicago, IL 60606
Fax: (312) 407-8080; Email: cdickers@skadden.com
Counsel for: US Airways, Inc., MidAtlantic Airways Inc.
US Airways Group, Inc., US Airways Licensing
Allegheny Airlines, Inc., PSA Airlines, Inc.
Material Services Company, Inc.
Piedmont Airlines, Inc.

Dominic DiNapoli

FTI Consulting, Inc.
1177 Avenue of the Americas 3rd Fl.
New York, NY 10030
Fax: (846) 741-8940; Email: Dominic.DiNapoli@fticonsulting.com
Counsel for: FTI Consulting, Inc.

Christopher B. Dolan

Dolan Law Firm
333 Pine Street 4th Floor
San Francisco, CA 94104
Fax: 2154212830; Email: cbdol@cbdolan.com
Counsel for: Kenneth Scott Justel

Kevin C. Driscoll, Jr.

Dames & Moore
One North Wacker Drive Suite 4400
Chicago, IL 60606
Fax: (312) 759-5648; Email: kevin.driscoll@dlm.com
Counsel for: Indiana Department of Commerce
Indiana Transportation Finance Authority

Cristina L. Duley

White & Case LLP
1155 Avenue of the Americas
New York, NY 10030
Fax: (212) 354-8113; Email: CDuley@ny.whitecase.com
Counsel for: Aircraft Finance Parties

Robin M. Edwards

Sonnenachin, Nath & Rosenthal LLP
805 Market Street, Sixth Floor
San Francisco, CA 94105
Fax: 4155435472; Email: redwards@sonnenachin.com
Counsel for: Official Committee of Unsecured Creditors

Michael M. Eldelman

Vedder Price Kaufman & Kammholz
222 North LaSalle Street, Suite 2600
Chicago, IL 60601-1003
Fax: 3125066006; Email: meidelman@vedderprice.com
Counsel for: UAL Corp.

Richard L. Epling

Pillsbury Winthrop LLP
1540 Broadway
New York, NY 10036
Fax: (212) 868-1500; Email: reppling@pillsburywinthrop.com
Counsel for: Cooperativa Centrala Ruffaiana-Scorentechbank
Mitani & Co. (USA), Inc.
UGT Kumia/TLC Saintpaulie Limited
UGT-2 Kumia/TLC Liams Ltd.

Lisa H. Fenning

Dewey Ballantine LLP
333 South Grand Avenue, 26th Floor
Los Angeles, CA 90071
Fax: (213) 621-6111; Email: lisa.fenning@deweyballantine.com
Counsel for: Verizon Capital Corporation
Walt Disney Pictures & Television
Morgan Stanley
Infiruck I, LLC

James M. Finberg

Luff, Cabrerer, Holmann & Bernstein LLP
Embarcadero Center West, 275 Battery Street, 30th Floor
San Francisco, CA 94111-3336
Fax: 4159561008; Email: jfinberg@lchb.com
Counsel for: Frank, et al.

Robert M. Fishman

Shaw, Gussis, Fishman, Glantz & Wafenn, LLC
1144 W. Fulton St., Suite 200
Chicago, IL 60607
Fax: (312) 541-0155; Email: rfishman@shawgussis.com
Counsel for: Atlantic Coast Airlines, Inc.

Michael J. Flaherty

Flaherty & Jacobson, PC
134 North LaSalle Street, Suite 1800
Chicago, IL 60602
Fax: (312) 782-4725; Email: mflaherty@fjlaw.com
Counsel for: Goodrich Corporation

Mark T. Flewelling

Anglin, Flewelling, Rasmussen LLP
c/o Brandon C. Ives, 109 South Los Robles Avenue, Suite 600
Pasadena, CA 91101-2459
Fax: 6265777784; Email: mtf@afrci.com
Counsel for: Airport Group International, Inc.

Henry A. Efroymson

Joe Miller
One American Square, P.O. Box 82001
Indianapolis, IN 46280
Fax: (317) 592-4843; Email: henry.efroymson@joemiller.com
Counsel for: Indianapolis Airport Authority
Citizens Gas & Coke Utility

David S. Elkind

Rebut, MacMurray, Hewitt & Maynard
45 Rockefeller Plaza
New York, NY 10111
Fax: 2128415725; Email: delkind@rebut.com
Counsel for: British Airways Plc

Brad B. Erens

Jones, Day, Roavia & Pogue
77 West Wacker
Chicago, IL 60601
Fax: (312) 782-8685; Email: jdrpusa@jowesday.com
Counsel for: Continental Airlines, Inc.

Marc I. Fenton

Piper Rudnick
203 N. LaSalle St., Suite 1800
Chicago, IL 60601-1203
Fax: (312) 630-6348; Email: marc.fenton@piperudnick.com
Counsel for: All Canada
Wachovia Bank, N.A.
New First Union National Bank

Mark A. Fink

Sonnenachin, Nath & Rosenthal LLP
1221 Avenue of the Americas, 24th Floor
New York, NY 10020
Fax: 2127888800; Email: mfink@sonnenachin.com
Counsel for: Creditors Committee

Janet Fitzpatrick, Legal Assistant

Unisys Corporation
Unisys Way, P.O. Box 5111, M/S L8-108
Blue Bell, PA 19424
Fax: 2150866721; Email: janet.fitzpatrick@unisys.com
Counsel for: Unisys Corporation

Steven B. Flancher, Assistant Attorney General

State of Michigan, Attorney General
Department of Attorney General Revenue and Collections Division, First Floor
Lansing, MI 48922
Fax: 5173354878; Email:
Counsel for: State of Michigan

Carol Flowe

Arnot Fox Kintner Plaklin & Kahn PLLC
1650 Connecticut Avenue, N.W.
Washington, DC 20036-5339
Fax: (202) 867-6395; Email: flowe.carol@arentfox.com
Counsel for: Suntrust Bank
Vanguard Municipal Bond Funds

John F. Eid

ARINC, Inc.
2551 Riva Road
Annapolis, MD 21401
Fax: (410) 573-3278; Email: jfe@arinc.com
Counsel for: ARINC, Inc.

Patricia J. Emshwiller, Esq.

Schiff, Hardin & White
233 S. Wacker Drive, 8000 Sears Tower
Chicago, IL 60606-8473
Fax: (312) 258-5700; Email: pemshwiller@schiffhardin.com
Counsel for: Pratt & Whitney
Hamilton Sundstrand Corporation

Mark E. Felger, Esq.

Cozen O'Connor
Chase Manhattan Centre, 1201 North Market Street, Suite 1400
Wilmington, DE 19801
Fax: (302) 295-2013; Email: mfelger@cozen.com
Counsel for: Argencbright Security, Inc.

Jorge A. Fernandez-Reboredo

Rivera & Fernandez-Reboredo, PSC
P.O. Box 360784
San Juan, PR 00936-0784
Fax: 7872810708; Email: jfernandez@rfpssc.com
Counsel for: Puerto Rico Ports Authority

J. Mark Fisher, Esq.

Schiff, Hardin & White
8800 Sears Tower
Chicago, IL 60606-8473
Fax: (312) 258-5700; Email: mfisher@schiffhardin.com
Counsel for: Pratt & Whitney
Hamilton Sundstrand Corporation

Dennis D. Fitzpatrick

Clauson Miller P.C.
10 S. LaSalle St.
Chicago, IL 60603-1112
Fax: 3128087500; Email: dfitzpatrick@clauson.com
Counsel for: Irene Tai Chang Hux
Michael Sun

J. Brian Fletcher

Jessop & Co., PC
303 E. 17th Ave., Suite 230
Denver, CO 80203
Fax: (303) 880-7233; Email: jbfletcher@jessopco.com
Counsel for: Denver International Airport
City and County of San Francisco
using by and through San Francisco Airport Comm.

Wilbur F. Foster, Jr.

MBBank, Twined, Hadley & McCloy LLP
1 Chase Manhattan Plaza
New York, NY 10005
Fax: (212) 822-5058; Email: wfoster@mbbank.com
Counsel for: BNP Paribas, Credit Agricole Indosuez S.A.
Diamond Lease (USA), Inc.
Export Development Canada
Hamburg Landesbank Girozentrale, Hypovereitbank
Luxembourg Societe Anonyme, et al

Joseph D. Frank

Nasel, Garber & Foxenberg
Two North LaSalle Street Suite 7210
Chicago, IL 60602-3801
Fax: 3122801747; Email: jfrank@ngelaw.com
Counsel for: American State Bank
Hainick & Struggles International, Inc.
DiamondCluster International, Inc.
Dallas/Ft. Worth Int'l Airport Board
Sage Parts Plus, Inc.

Lisa E. Funk

American Airlines, Inc.
P.O. Box 819816 MD 5875
DFW Airport, TX 75281-9816
Fax: 8179672937; Email: lisa.funk@aad.com
Counsel for: American Airlines, Inc.

Gilles Gareau

Lauzon Belanger
511 Place Dumas Suite 200
Montreal, QC H2Y 2W7 Canada
Fax: ; Email: ggareau@lauzonbelanger.qc.ca
Counsel for: Always Travel, Inc.
Highbourne Enterprises, Inc.
Canadian Standard Travel Agent Registry

Geoffrey H. Garrett

Attorney at Law
8311 SE 83rd Street
Mercer Island, WA 98040
Fax: ; Email: ghgarrett@atbi.com
Counsel for: ALPA

Matthew T. Gensburg

Greenberg Traugott, LLP
77 West Wacker Dr., Suite 2400
Chicago, IL 60601
Fax: (312) 456 8436; Email: gensburgm@gtlaw.com
Counsel for: City of Chicago

David A. Gill

Danning, Gill, Diamond & Koltz, LLP
2020 Century Park East Third Floor
Los Angeles, CA 90067-2804
Fax: (310) 277-5735; Email: dagill@djdk.com
Counsel for: City of Los Angeles, Dept. of Airports

Adrienne Go, Deputy City Attorney

San Francisco International Airport
International Terminal 5th Fl. PO Box 8007
San Francisco, CA 94128
Fax: (415) 421-5098; Email: Adrienne.Go@flysfo.com
Counsel for: San Francisco International Airport
City and County of San Francisco

Richard N. Golding

Katz Randolph Weinberg & Richmond
333 W. Wacker Dr. Suite 1800
Chicago, IL 60606
Fax: 3126073903; Email: rgolding@krw.com
Counsel for: Port Authority of New York and New Jersey

Henry Goodman

Katten Muchin Zavis Rosenman
575 Madison Avenue
New York, NY 10022
Fax: (212) 840-8778; Email: henry.goodman@kmzr.com
Counsel for: HypoVereinsbank

Jeff J. Friedman

Katten Muchin Zavis Rosenman
575 Madison Avenue
New York, NY 10022
Fax: 2129407100; Email: jeff.friedman@kmzr.com
Counsel for: Societe Nationale D'Etude et de Construction
de Moteurs D'Aviation

Richard P. Garden

Cline, Williams, Wright, Johnson & Dillfether LLP
1900 U.S. Bank Building 233 South 13th Street
Lincoln, NE 68508-2095
Fax: 4024745303; Email: rgarden@cline-law.com
Counsel for: Travel & Transport, Inc.

Jeffrey Gargano

Wallenstein & Wagner, Ltd.
311 South Wacker Drive Suite 5300
Chicago, IL 60606
Fax: 3125643301; Email: jgargano@wallwag.com
Counsel for: Pinsky Bowles Credit Corporation

Frances Gecker, Esq.

Nasel, Garber & Foxenberg
Two North LaSalle Street Suite 2200
Chicago, IL 60602-1747
Fax: 3122801747; Email: fgecker@ngelaw.com
Counsel for: American State Bank
Holdrick & Struggles International, Inc.
DiamondCluster International, Inc.
Dallas/Ft. Worth Int'l Airport Board
Sage Parts Plus, Inc.

Toby L. Gerber

Fulbright & Jaworski LLP
2200 Ross Avenue Suite 2600
Dallas, TX 75201-2784
Fax: 2145559200; Email: tgerber@fulbright.com
Counsel for: International Air Transport Association

R. Dale Ginter, Esq.

Downey Brand LLP
666 Capitol Mall 10th Floor
Sacramento, CA 95814-4890
Fax: (916) 441-4021; Email: dginter@downeybrand.com
Counsel for: California Statewide Communities Development Auth

Ronald W. Goldberg

Derrick, Harrington & Sutcliffe, LLP
777 South Figueroa Street Suite 3200
Los Angeles, CA 90017-5855
Fax: 2136122499; Email: rgoldberg@derrick.com
Counsel for: WustLB AG, Neue Westdeutsche Landesbank
Girozentrale, New York Branch

Ira H. Goldman

Shipman & Goodwin LLP
One American Row
Hartford, CT 06103
Fax: ; Email: hankmptoy@goodwin.com
Counsel for: Wells Fargo Bank, National Association

Barbara Goodstein

Clifford Chance US LLP
200 Park Avenue
New York, NY 10022
Fax: 2128789375; Email: barbara.goodstein@cliffordchance.com
Counsel for: Nomura Uabcock & Brown Co., Ltd

Shari L. Friedman

Marwede, Minichello & Reeb
10 South Riverside Plaza, Suite 720
Chicago, IL 60606
Fax: (312) 907-4400; Email: sfriedman@mmr-law.com
Counsel for: Chromalloy Gas Turbine Corporation

William Gardner

Mayat Brown Rowe & Maw LLP
1675 Broadway
New York, NY 10019-5820
Fax: (212) 262-1910; Email: wgardner@mayatbrownrowe.com
Counsel for: Barclays Bank PLC

Arthur S. Garrett, III

Keller & Heckman LLP
1001 Q Street, N.W., Suite 500 West
Washington, DC 20001
Fax: 202344846; Email: garrett@khlaw.com
Counsel for: Alan Science and Technology, Inc.
Huntan Factors Applications, Inc.
Bahman Alavi, Sidney Friedman and Larry Watson

Kimberly A. Geiler

Gibson, Dunn & Crutcher, LLP
2100 McKinsey Ave. Suite 1100
Dallas, TX 75201
Fax: (214) 898-3400; Email: kgeiler@gibsondunn.com
Counsel for: Atlantic Coast Airlines

Douglas C. Glese

Defrees & Fiske
200 South Midland Avenue Suite 1100
Chicago, IL 60604
Fax: 3123050817; Email: doglese@defrees.com
Counsel for: City & County of Denver

Steven A. Ginter, Special Assistant Attorney General

Missouri Department of Revenue
General Counsel's Office 301 W. High Street, Room 610 P.O. Box 475
Jefferson City, MO 65109-0475
Fax: 5737517232; Email: sdginter@mail.dor.state.mo.us
Counsel for: Missouri Department of Revenue

Thomas D. Goldberg, Esq.

Day, Berry & Howard
One Canterbury Green
Stamford, CT 06901-2047
Fax: (203) 377-7301; Email: tdgoldberg@dbh.com
Counsel for: Pratt & Whitney

Harley J. Goldstein

Freeman & Peters
311 S. Wacker Drive Suite 3000
Chicago, IL 60606
Fax: 3123500572; Email: hgoldstein@freemorpeters.com
Counsel for: OurHouse, Inc.

Bruce Gordon

IBM Credit Corporation
Restructuring Group - MD NC317 North Castle Drive
Armonk, NY 10504
Fax: 8454913284; Email: gordonbr@us.ibm.com
Counsel for: IBM Credit Corporation

David B. Goroff

Foley & Lardner
321 North Clark Street Suite 2800
Chicago, IL 60610
Fax: 312/447-5281, Email: dgoroff@foleylaw.com
Counsel for: Port of Portland; Tucson Airport Auth
John Wayne Airport; Miami Dade County, Florida
Detroit Metropolitan Wayne County Airport
Port of Oakland
Metropolitan Washington Airport Authority

Brian M. Graham

Shaw, Gussis, Fishman, Glantz & Wolfson, LLC
1144 W. Fulton St. Suite 200
Chicago, IL 60607
Fax: (312) 541-0155; Email: bgraham@shawgussis.com
Counsel for: Atlantic Coast Airlines, Inc.

Jonathan S. Green

Miller, Canfield, Paddock & Stone PLC
150 West Jefferson Avenue Suite 2500
Detroit, MI 48226
Fax: 313/4966450; Email: jgreen@mlcrmlcr.com
Counsel for: Retirement Systems of Alabama

Judy A. Groves

Palmer & Dodge, LLP
111 Huntington Ave
Boston, MA 02109-7013
Fax: (617) 227-4420; Email: jgroves@palmerdodge.com
Counsel for: State Street Bank & Trust Co.
State Street Bank & Trust Co. of Connecticut

Peter J. Gurfel

Akin Gump Strauss Hauer & Feld LLP
2020 Century Park East Suite 2400
Los Angeles, CA 90007
Fax: 310/291-0011; Email: pgurfel@akingump.com
Counsel for: WestLB AG, P/O Westdeutsche Landesbank
Girozentrale, New York Branch

Judith A. Hall

Babcock & Brown LP
2 Harrison St.
San Francisco, CA 94103
Fax: (415) 207-1500; Email: judith.hall@babcockbrown.com
Counsel for: Babcock & Brown LP

Jonathan C. Hantke

Aldine Independent School District
14910 Aldine-Westfield Road
Houston, TX 77032
Fax: 281/856321; Email: jhantke@aldine.k12.tx.us
Counsel for: Aldine Independent School District

Ruth A. Harvey

US Department of Justice
Civil Division PO Box 875 Ben Franklin Station
Washington, DC 20044
Fax: (202) 514-8163; Email: ruth.harvey@usdoj.gov
Counsel for: US Department of Justice

Nathan Haynes

Cadwalader, Wickersham & Taft
100 Maiden Lane
New York, NY 10038
Fax: (212) 504-6606; Email: nathan.haynes@cw.com
Counsel for: Northwest Airlines

William F. Govler

Bingham McCutchen LLP
One State Street
Hartford, CT 06103
Fax: 312/402508; Email: william.govler@bingham.com
Counsel for: Debtor's 1991 V Equipment Trust

Paul A. Greco

DiMonte & Lutz
210 W. Higgins Road
Park Ridge, IL 60068
Fax: 847/6989823; Email: pgreco@dimonteandlutz.com
Counsel for: Advanced Roofing, Inc.

Ira S. Greene

Hogan & Hartson, LLP
551 Fifth Ave.
New York, NY 10176
Fax: (212) 667-6666; Email: igreene@hhlaw.com
Counsel for: Discover Financial Services

Matthew J. Gryzlo

Wellenstein & Wagner, Ltd.
311 South Wacker Drive Suite 6300
Chicago, IL 60606
Fax: 312/543301; Email: mgryzlo@www.firm.com
Counsel for: Pinyon Rowes Credit Corporation

Deborah M. Gutfeld

Piper Rudnick
203 North LaSalle St., Suite 1800
Chicago, IL 60601-1203
Fax: (312) 530-5336; Email: deborah.gutfeld@piperudnick.com
Counsel for: Wachovia Bank, N.A.
Mo's First Union National Bank
Michelin Aircraft Tire Corporation

Aaron L. Hammer, Esq.

Mayer Brown Rowe & Maw LLP
190 South LaSalle Street
Chicago, IL 60603
Fax: (312) 701-7111; Email: ahammer@mayerbrown.com
Counsel for: Philip Morris Capital Corp.
General Foods Credit Investors No. 3 Corp.

David J. Harris

Burch, Porter & Johnson
130 North Court Avenue
Memphis, TN 38103
Fax: 901/5246024; Email: dharris@bjplaw.com
Counsel for: Hilton Hotels Corporation

James F. Hayden

White & Case LLP
1155 Avenue of the Americas
New York, NY 10038
Fax: (212) 354-6118; Email: jhayden@whitecase.com
Counsel for: UJ Bank Limited, Chicago Branch

Thomas E. Healey

Katten Muchin Zavis Rosenman
1025 Thomas Jefferson Street, N.W.
Washington, DC 20007
Fax: 202/207570; Email: thomas.healey@kmzr.com
Counsel for: Hypovereins Bank

Jeffrey J. Graham

Sommer Barnard Ackerson, PC
4000 Bank One Tower 111 Monument Circle
Indianapolis, IN 46204
Fax: (317) 235-8002; Email: jgraham@sbawyers.com
Counsel for: City of Indianapolis

Gary E. Green

Coston & Lichtman
407 S. Dearborn St., Suite 600
Chicago, IL 60605
Fax: 312/277-3550; Email: ggreen@costonlaw.com
Counsel for: General Electric Capital Corporation

John Grossbart

Sonnenchein, Nath & Rosenthal LLP
8000 Sears Tower 233 S. Wacker Drive
Chicago, IL 60606
Fax: 312/8787934; Email: jgrossbart@sonnenchein.com
Counsel for: Creditors Committee

Elizabeth M. Guffy

Dewey Ballantine LLP
700 Louisiana Suite 1900
Houston, TX 77002
Fax: (713) 445-1533; Email: ualservic@deweyballantine.com
Counsel for: Varian Capital Corporation
Walt Disney Pictures & Television
Morgan Stanley
Intracore, LLC

W. Thomas Halbleib

Sittes & Harrison, PLLC
400 West Market St.
Louisville, KY 40202
Fax: (502) 587-6381; Email: thalbleib@sittes.com
Counsel for: Reagan Airport Auth of Louisville/Jefferson City
Lexington-Fayette Urban Airport Board

Lawrence M. Handelsman

Stroock & Stroock & Lavan
180 Maiden Lane
New York, NY 10039-4082
Fax: (212) 806-6006; Email: lhandelsman@stroock.com
Counsel for: Delta Air Lines, Inc.

Steven M. Hartmann

Freeman & Poles
311 S. Wacker Drive Suite 3000
Chicago, IL 60606-8877
Fax: 312/3606573; Email: shartmann@freemcorp.com
Counsel for: Chase Transportation
Chase Terminal
Motive
SOPUS
Shell Pipeline

David Hayes, Chief Legal Officer

Trans States Airlines, Inc.
11485 Natural Bridge Road
St. Louis, MO 63044
Fax: 314/224311; Email:
Counsel for: Trans States Airlines, Inc.

John McL. Healy, Esq.

IAE International Aero Engines AG
IAE Building 400 Main Street, M/S 121-10
East Hartford, CT 06108
Fax: (800) 565-6220; Email: jhealy@iae2500.com
Counsel for: IAE International Aero Engines AG

Paul E. Heath

Vinson & Elkins LLP
3700 Trammell Crow Center 2001 Ross Avenue
Dallas, TX 75201-2076
Fax: (214) 866-1878; Email: phealth@vselaw.com
Counsel for: Dallas/Ft. Worth Int'l Airport Board

Steven Heim, Esq.

Dorsey & Whitney LLP
50 South Sixth Street
Minneapolis, MN 55402-1408
Fax: (612) 340-2543; Email: heim.steven@dorseylaw.com
Counsel for: U.S. Bank National Association

Jeffery D. Hermann

Orlick, Herrington & Sutcliffe, LLP
177 South Figueroa Street Suite 3200
Los Angeles, CA 90017-5855
Fax: 2130122400; Email: jhermann@orlick.com
Counsel for: WestLB AG

Cathy Hershcopf

Kronish, Lieb, Weiner & Hellman LLP
1114 Avenue of the Americas
New York, NY 10036
Fax: (212) 479-0276; Email: chershcopf@kronishlieb.com
Counsel for: UAL ESOP

Ken Higman

Hewlett Packard Company
2125 E. Katella Avenue
Anaheim, CA 92806
Fax: (714) 940-7630; Email: ken.higman@hp.com
Counsel for: Hewlett-Packard Company

Michael Hoggan

Wells Fargo Bank Northwest, NA
Corporate Trust Services 200 S. Main Street 12th Floor
Salt Lake City, UT 84111
Fax: (801) 246-5053; Email: michael.hoggan@wellsfargo.com
Counsel for: Wells Fargo Bank Northwest, NA

James D. Holzhauser

Mayer Brown Rowe & Maw LLP
160 South LaSalle Street
Chicago, IL 60603
Fax: 3127089185; Email: jholzhauser@mayerbrownrowe.com
Counsel for: Glenn F. Tilton

Alan Horowitz

Buchalter, Newman, Fields & Younger
895 Dove Street Suite 400
Newport Beach, CA 92668 8120
Fax: 9497200150; Email: ahorowitz@buchalter.com
Counsel for: Oracle Corporation

Cassandra Ingram

Wells Fargo Investments, LLC
MAC N6003-089 608 Second Ave South, 8th Floor
Minneapolis, MN 55402
Fax: 6120072518; Email: cassandra.ingram@wellsfargo.com
Counsel for: Wells Fargo

Mark F. Hebbeln

Santner, Carlton & Douglas
321 N. Clark Street Suite 3400
Chicago, IL 60610
Fax: (312) 844-3381; Email: mhebbeln@gcd.com
Counsel for: HSBC Bank USA
Fifth Third Bank

David Heller

Latham & Watkins
233 S. Wacker Drive Suite 5800
Chicago, IL 60606
Fax: (312) 943-9787; Email: david.heller@lw.com
Counsel for: Bank One

Robert W. Herrman

Investment Management Advisors, LLC
800 F. Northwest Highway
Suite #203
Mt. Prospect, IL 60056
Fax: 847/7098005; Email: rherrman@ima-advisors.com
Counsel for: PSFG Resources, LLC

Neil H. Herskowitz

Riverside Contracting LLC
P.O. Box #26 Planetarium Station
New York, NY 10024-0540
Fax: 2125017098; Email:
Counsel for: Regan Capital I, Inc

Barbara M. Hill, Asst. County Atty.

Broward County Aviation Department
320 Trammell Drive
Fort Lauderdale, FL 33315
Fax: (954) 359-1262; Email: bhill@broward.org
Counsel for: Broward County

Margaret A. Holland

New Jersey Attorney General's Office
Division of Law R.J. Hughes Justice Complex P.O. Box 108, 25 Market S
Trenton, NJ 08620
Fax: (609) 292-6007; Email: hollamarg@law.dnrlpa.state.nj.us
Counsel for: New Jersey Director, Div. Of Taxation

Edward B. Hopper

Stewart & Irwin, P.C.
251 E. Ohio Street Suite 1100
Indianapolis, IN 46204
Fax: 3178321319; Email: ehopper@stewart-irwin.com
Counsel for: Ike Williamson, et al.

Miles Hughes

McDermott Will & Emery
227 West Monroe Street
Chicago, IL 60606
Fax: 3129847700; Email: mhughes@mwe.com
Counsel for: Bank of New York

Kenneth W. Irvin

Morseon & Forster LLP
2000 Pennsylvania Ave. N.W. Suite 5500
Washington, DC 20036-1888
Fax: 2028870703; Email: kmorseon@mfa.com
Counsel for: San Diego County Regional Airport Authority

Steven M. Hedberg

Perkins Cole LLP
1701 Third Avenue Suite 4100
Seattle, WA 98101-3099
Fax: 2066338500; Email: shedberg@perkinscole.com
Counsel for: The Boeing Company
Boeing Capital Corp.

Eric Henricks

Nationwide Mutual Insurance Company
One Nationwide Plaza
Columbus, OH 43215
Fax: 6145772285; Email: henrice@nationwide.com
Counsel for: Nationwide Life Insurance Company
Provident Nationwide Provident & Life Mutual
Life Insurance Company

Robert Herrmann

Pitney Bowes Credit Corporation
27 Waterview Drive
Shelton, CT 06484-4381
Fax: 2039224020; Email: robert.herrmann@pb.com
Counsel for: Pitney Bowes Credit Corporation

Richard Hiersteiner

Palmer & Dodge, LLP
111 Huntington Ave. Prudential Center
Boston, MA 02199-7813
Fax: (617) 227-4420; Email: rhiersteiner@palmerdodge.com
Counsel for: State Street Bank & Trust Co.
State Street Bank & Trust Co. of Connecticut

Barbara J. Hillman

Cornfield & Feldman
25 L. Washington St. Suite 1400
Chicago, IL 60602
Fax: (312) 238-5689; Email: bhillman@cornfieldandfeldman.com
Counsel for: Association of Flight Attendants

Brian L. Holman

White & Case LLP
833 West Fifth Street #1900
Los Angeles, CA 90071-2007
Fax: (213) 897-4158; Email: bholman@whitecase.com
Counsel for: AT&T Credit Holdings, Inc., et al.
Bank of America (vendor & leasing and cap)
DFG Partnership
Lone Star Air Partners LLC
USWFS Intermediary Trust

John D. Horenstein

Gordon & Forsyth LLP
885 Third Avenue
New York, NY 10017
Fax: 2123704453; Email: jhorenstein@gordonlaw.com
Counsel for: Mitsubishi Heavy Industries, Ltd.

John D. Huie

Unisys Corporation
885 Blairmoor Court
Grosse Pointe Woods, MI 48236
Fax: 3133439441; Email: john.huie@unisys.com
Counsel for: Unisys Corporation

Peter A. Ivanick

LoBosoff, Lamb, Greene & MacRae, LLP
125 West 55th Street
New York, NY 10019-5308
Fax: (212) 424-8500; Email: pivanick@lbgm.com
Counsel for: Wachovia Bank, N.A.
Wife First Union National Bank

Paula K. Jacobbi

Sugar, Friedberg & Wisenthal
30 North LaSalle St., Suite 3000
Chicago, IL 60602
Fax: (312) 372-7951; Email: pjacobbi@sff-law.com
Counsel for: Suntrust Bank
Vanguard Municipal Bond Funds

Fruman Jacobson

Sonnenchein, Nath & Rosenthal LLP
8000 Sears Tower 233 S. Wacker Drive
Chicago, IL 60608
Fax: (312) 676-7934; Email: fjacobson@sonnenchein.com
Counsel for: Creditors Committee

Snyder James

Noel, Garber & Eisenberg
Two North LaSalle Street, Suite 2700
Chicago, IL 60602-3801
Fax: (312) 208-1747; Email: jsnyder@angelaw.com
Counsel for: American State Bank
Hendrick & Struggles International, Inc.
Diamond Cluster International, Inc.
Dallas/Ft. Worth Int'l. Airport Board
Sage Parts Plus, Inc.

Brian A. Jennings

Perkins Cole LLP
1201 Third Avenue 48th Floor
Seattle, WA 98101-3099
Fax: 2065836500; Email: bjennings@perkinscole.com
Counsel for: The Boeing Company
Boeing Capital Corp.

Thomas L. Johns

Ollust, Inc.
111 Broadway 9th Floor
New York, NY 10005
Fax: ; Email: tjohns@ollust.com
Counsel for: Ollust, Inc.

Russell R. Johnson, III

Attorney at Law
3734 Byfield Place
Richmond, VA 23233
Fax: ; Email: russj47@att.net
Counsel for: Public Service Electric & Gas Co.
Commonwealth Edison Company
Michigan Consolidated Gas Company

Laura D. Jones

Pacholski, Stang, Ziehl, Young & Jones
919 N. Market St. Suite 1800
Wilmington, DE 19801
Fax: (302) 852-4400; Email: ljones@stang.com
Counsel for:

Danni L. Jorenby, Deputy

State of Wisconsin
Department of Workforce Development Unemployment Insurance P.O. B
Madison, WI 53708
Fax: 608/2888882; Email: djlarenby@dwd.state.wi.us
Counsel for: State of Wisconsin

Harold L. Kaplan

Gardner, Canton & Druggie
321 N. Clark Street Suite 3400
Chicago, IL 60610-4785
Fax: (312) 644-3381; Email: hkaptan@gcd.com
Counsel for: HSBC Bank USA
Fifth Third Bank

David Jacobson

Sonnenchein, Nath & Rosenthal LLP
8000 Sears Tower 233 S. Wacker Drive
Chicago, IL 60608
Fax: (312) 676-7934; Email: djacobson@sonnenchein.com
Counsel for: Creditors Committee

Richard J. Jacobson

Fisher & Jacobson, PC
134 North LaSalle Street Suite 1000
Chicago, IL 60602
Fax: (312) 782-4725; Email: rjacobson@fjlaw.com
Counsel for: Goodrich Corporation

Kim Y. Jefferson

Tennessee Attorney General's Office
Office of the Attorney General Bankruptcy Division PO Box 20207
Nashville, TN 37202
Fax: (615) 741-3334; Email: kim.jefferson@state.tn.us
Counsel for: Tennessee Attorney General's Office

Steven D. Jerome

Snell & Wilmer LLP
One Arizona Center 400 E. Van Buren St.
Phoenix, AZ 85004-2202
Fax: 6023826070; Email: sjerome@snwlaw.com
Counsel for: Tucson Airport Authority ("TAA")

David P. Johnson

Hamilton-Sundstrand
4747 Harrison Avenue Mail Stop 255-9
Rockford, IL 61108
Fax: (815) 394-2439; Email: davidp.johnson@hsa,inc.com
Counsel for: Hamilton-Sundstrand

James O. Johnston

Hennigan, Burnett & Norman LLP
801 S. Figueroa St. Suite 3300
Los Angeles, CA 90017
Fax: (213) 604-1234; Email: johnstony@hbnlaw.com
Counsel for: Franklin Advisors, Inc.
Oaktree Capital Management LLC

Patrick M. Jones

Greenberg Traurig, LLP
77 West Wacker Drive, Suite 2400
Chicago, IL 60601
Fax: (312) 460-8435; Email: pjones@gtlaw.com
Counsel for: City of Chicago

David Kane

Freeborn & Peters
311 S. Wacker Drive Suite 3000
Chicago, IL 60606
Fax: 3123900672; Email: dkane@freebornpeters.com
Counsel for: OurHouse, Inc.

James Katchadurian

Poulsen-Douglas Corporation
49 Tenth Hill Circle
Gardens Bridge, NY 10520
Fax: (914) 706-4900; Email: james.katchadurian@poulsen-douglas.com
Counsel for: Poulsen-Douglas Corporation

Barbara Jacobson, Esq.

Port of Portland
7000 NE Airport Way, 3rd Floor
Portland, OR 97218
Fax: (503) 548-5586; Email: jacobbb@portptid.com
Counsel for: Port of Portland

Steven R. Jakubowski

Robert F. Coleman & Associates
77 West Wacker Drive Suite 4800
Chicago, IL 60601
Fax: (312) 444-1028; Email: sjakubowski@colemanlawfirm.com
Counsel for: Carle Ganunod

William S. Jenkins

Myers & Jenkins
3003 North Central Avenue Suite 1600
Phoenix, AZ 85012
Fax: (602) 209-7810; Email: wsj@mjllegal.com
Counsel for: City of Des Moines, IA Dept of Aviation

Douglas W. Jessop

Jessop & Co., PC
303 E. 17th Ave. Suite 930
Denver, CO 80203
Fax: (303) 860-7233; Email: dwjessop@jessopco.com
Counsel for: Denver International Airport
City and County of San Francisco,
acting by and through San Francisco Airport Comm.

Cindy R. Johnson

Imperial County Treasurer
940 West Main Street Suite 100
El Centro, CA 92243
Fax: 7603527003; Email: cindyjohnson@imperialcounty.net
Counsel for: County of Imperial, California

Julie Johnston-Ahlen

Mayer Brown Rowe & Maw LLP
190 South LaSalle Street
Chicago, IL 60603
Fax: (312) 7017711; Email: johnston-ahlen@mayerbrownrowe.com
Counsel for: General Foods Credit Investors Nn. 3 Corp.

Gregory J. Jordan

Rooks Pitts
10 S. Wacker Drive Suite 2300
Chicago, IL 60606
Fax: 8608980830; Email: gjordan@rookspitts.com
Counsel for: John D. Stewart
John H. Fulmer
Layton S. Han
Craig S. Stevens

William W. Kannel, Esq.

Mintz, Levin, Cohn, Fenn, Glovsky & Popeo, P.C.
One Financial Center
Boston, MA 02111
Fax: (617) 542-2241; Email: wkannel@mintz.com
Counsel for: Fifth Third Bank, N.A.

Harold A. Katz

Katz, Friedman, Eagle, Eisenstein & Johnson
77 West Washington Street 20th Floor
Chicago, IL 60602
Fax: (312) 372-5555; Email: hkatz@kfwj.com
Counsel for: Air Line Pilots Association, Intl.

Andrew S. Kelley

Arnold & Porter LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-1370
Fax: 303.632.0428; Email: andrew.kelley@apporter.com
Counsel for: *Gale Gourmet Inc.*

Anne Marie Kennelly

Hewlett-Packard Company
3000 Hanover St., M/S 1050
Palo Alto, CA 94304
Fax: (800) 852 8017; Email: anne.kennelly@hp.com
Counsel for: *Hewlett-Packard Company*

Jennifer L. Kevelson

Morgan, Lewis & Bockius, LLP
101 Park Avenue
New York, NY 10178-1000
Fax: 877.432.9052; Email: jkevelson@morganlewis.com
Counsel for: *JP Morgan Chase*
Chicorp USA, Inc.

Therese C. King

Foley & Lardner
321 North Clark Street, Suite 2800
Chicago, IL 60610
Fax: (312) 755-1925; Email: tking@foleylaw.com
Counsel for: *Port of Portland; Port of Oakland*
John Wayne/Detroit Met Wayne City Airport
Metropolitan Washington Airport Authority
Burlington Int'l Airport, Clark County, Nevada
City of Austin, Cleveland; Columbus Airport Auth

Clyde Kizer

Airbus
188 Van Buren St., Suite 3100
Hamden, VA 20170
Fax: (703) 834-3454; Email: clyde.kizer@airbus.com
Counsel for: *Airbus*

Joe Kohanski

Geffner & Bush
3500 W. Olive Ave., Suite 1100
Turbank, CA 91505
Fax: (618) 973-3201; Email: jkohanski@geffner-bush.com
Counsel for: *Int'l Assoc. of Machinists and Aerospace Workers*

Eugene J. Kottenstette

City & County of Denver
201 W. Colfax Avenue, Department 1207
Denver, CO 80202-5332
Fax: (303) 861-0007; Email: bankruptcy@eugenej.kottenstette.com
Counsel for: *City & County of Denver*

Richard P. Krasnow

Wail, Gotshal & Manges, LLP
707 Fifth Ave
New York, NY 10153
Fax: (212) 310-0007; Email: richard.krasnow@wmg.com
Counsel for: *General Electric Capital Corporation*
and certain of its affiliates

Jonathan D. Kron, Esq.

Mayer Brown Rowe & Maw LLP
100 South LaSalle Street
Chicago, IL 60603
Fax: (312) 701-7711; Email: jkron@mayerbrownrowe.com
Counsel for: *Philip Morris Capital Corp.*
General Foods Credit Investors No. 3 Corp.

John Lakosil

United Air Lines, Inc.
WHOLD 1200 E. Algonquin Rd.
Lakewood Village, IL 60007
Fax: (847) 700 4583; Email: John.Lakosil@ual.com
Counsel for: *UAL Corporation*

Wesley G. Kennedy

Allison, Slutsky & Kennedy, PC
2100 Smith LaSalle St., Suite 1800
Chicago, IL 60614
Fax: (312) 364 0410; Email: wkennedy@ask-attorneys.com
Counsel for: *Professional Airline Flight Controller Association - UAL*

Joseph E. Kernan, Lieutenant Governor

Indiana Department of Commerce
Office of the Lieutenant Governor
Indianapolis, IN 46204-2700
Fax: (317) 232-4788; Email: jkernan@state.in.us
Counsel for: *Indiana Department of Commerce*

Ayesha Khan

Salans
690 Fifth Avenue
New York, NY 10020
Fax: 212.632.5555; Email:
Counsel for: *Credit Lyonnais, et al.*

Christopher Kiplok

Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, NY 10004
Fax: 212.422.1726; Email: kiplok@hughes-hubbard.com
Counsel for: *Dahle Financial Services, Inc.*

Roy S. Kobert, P.A.

Broad & Cassel
380 N. Orange Ave., Suite 1100
Orlando, FL 32801
Fax: (407) 650-0927; Email: rkobert@broadandcassel.com
Counsel for: *Greater Orlando Aviation Authority*

Vincent A. Kolber

Resideo
Three First National Plaza, Suite 777
Chicago, IL 60602
Fax: (312) 726-3800; Email: kolber@resideo.com
Counsel for: *Vincent A. Kolber*

Stuart Kovensky

John A. Lovin & Co.
1 Rockefeller Plaza, 10th Floor
New York, NY 10020
Fax: (212) 332-8402; Email: skovensky@lovinc.com
Counsel for:

John P. Kraiss

Law Office of John P. Kraiss
515 S. Flower St., Suite 3500
Los Angeles, CA 90071-2303
Fax: 213.190.2500; Email: jkraiss@wllglobal.net
Counsel for: *Meggitt Safety Systems, Inc.*

Jordan A. Kroop

Squire, Sanders & Dunne LLP
Two Renaissance Square, 40 North Central Avenue, Suite 2700
Phoenix, AZ 85004-4488
Fax: (602) 444-4444; Email: jkroop@squid.com
Counsel for: *Sky Mall*

Kathleen M. LaManna

Shipman & Goodwin LLP
One American Row
Hartford, CT 06103
Fax: (860) 261-1000; Email: klamanna@sgoodwin.com
Counsel for: *Wells Fargo Bank, National Association*

Thomas M. Kennedy

Pretzel & Stouffer, Chartered
One South Wacker Drive, Suite 2500
Chicago, IL 60606-4073
Fax: (312) 878-3816; Email: tkennedy@pretzel-stouffer.com
Counsel for: *American Airlines, Inc.*

Alexander D. Kerr, Jr.

Tishler & Wald, Ltd.
200 South Wacker Dr., Suite 2800
Chicago, IL 60606
Fax: (312) 878-3816; Email: akerr@tishlerandwald.com
Counsel for: *City of Des Moines, IA Dept of Aviation*

Marc Kieselstein

Kirkland & Ellis
200 E. Randolph Drive, Suite 6500
Chicago, IL 60601
Fax: (312) 861-2200; Email: marc_kieselstein@chicago.kirkland.com
Counsel for: *UAL Corporation*

Janice L. Kiraly

LSG Sky Chefs
Global Credit and Collections, 6191 North State Highway 101
Irving, TX 75038
Fax: 972.793.9008; Email: janice.kiraly@legskychefs.com
Counsel for: *LSG Sky Chefs*

Michael S. Kogan

Ervin, Cohen & Jessup LLP
9401 Wilshire Boulevard, 9th Floor
Beverly Hills, CA 90212
Fax: 310.850.2325; Email: mkogan@ecjlaw.com
Counsel for: *Ronald A. Katz Technology Licensing, L.P.*

Michelle L. Kopf

Sonnenchein, Nath & Rosenthal LLP
8000 Sears Tower, 233 S. Wacker Drive
Chicago, IL 60606
Fax: (312) 878-7834; Email: mkopf@sonnenchein.com
Counsel for: *Creditor's Committee*

Michael Kramer

Greenhill
300 Park Ave., 23rd Fl.
New York, NY 10022
Fax: (212) 380-1700; Email: mkramer@greenhill-co.com
Counsel for:

Richard M. Kremen, Esq.

Piper Rudnick LLP
9225 Smith Avenue
Baltimore, MD 21206-3000
Fax: (410) 580-3001; Email: richard.kremen@piperudnick.com
Counsel for: *Wachovia Bank, N.A.*
Ft's First Union National Bank
Boeing Aircraft Tire Corporation

Connie A. Lahn

Oppenheimer Wolff & Donnelly LLP
3300 Plaza VII, 45 South Seventh Street
Minneapolis, MN 55402
Fax: 612.607.7100; Email: clahn@oppenheimer.com
Counsel for: *Metropolitan Airports Commission*

Timothy J. Langella

Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.
One Financial Center
Boston, MA 02111
Fax: 617.422.2241; Email: tlangella@mintz.com
Counsel for: *Fifth Third Bank*

Joseph G. LaRusso, Assistant Corporation Counsel
City of Boston
City Hall Room M-5 One City Hall Square
Boston, MA 02201
Fax: 617/634702; Email: joseph.larusso@ci.boston.ma.us
Counsel for: City of Boston

Richard S. Lauter
Holland & Knight LLP
131 S. Dearborn Street, 30th Floor
Chicago, IL 60603
Fax: 312/780688; Email: richard.lauter@hklaw.com
Counsel for: Gato Gourmet Inc.
Gato Safe, Inc.

Linda S. Law
City of Portland - City Attorney's Office
1221 SW 4th Avenue Room 430
Portland, OR 97204
Fax: ; Email: law@ci.portland.or.us
Counsel for: City of Portland

Lon P. LeClair
Wells Fargo
Sixth & Marquette N0303-120
Minneapolis, MN 55479
Fax: ; Email: bankruptcy@wellsfargo.com
Counsel for: Wells Fargo Bank, National Association

Michael D. Lee
Schuyler, Roche & Zimer, P.C.
One Prudential Plaza Suite 3000
Chicago, IL 60601
Fax: (312) 565 8300; Email: mlee@erzow.com
Counsel for: Verizon Capital Corporation
Walt Disney Pictures & Television
Morgan Stanley
Intracore, LLC

Mark E. Leipold
Gould & Ratner
222 North LaSalle Street Suite 900
Chicago, IL 60601-1095
Fax: 312/2533241; Email: mleipold@gouldratner.com
Counsel for: U.S. Bank N.A.

Brian Leitch
Arnold & Porter LLP
370 Seventeenth Street Suite 4500
Denver, CO 80202-1570
Fax: 303/8320428; Email: brian.leitch@apporter.com
Counsel for: Gale Gourmet Inc.

David LeMay
Charlbourne & Parks LLP
30 Rockefeller Plaza
New York, NY 10112
Fax: 646/7105112; Email: dlemay@charlbourne.com
Counsel for: Citibank Privatkunden AG

Heather Lennox
Jones, Day, Reavis & Pogue
North Point 901 Lakeside Avenue
Cleveland, OH 44114
Fax: (216) 579-0212; Email: jdplax@jonesday.com
Counsel for: National Processing Company LLC
National City Bank of Kentucky

Edward J. Lesniak, Esq.
Burke, Warren, MacKay & Serritella
330 N. Wabash Ave. 22nd Fl. IBM Plaza
Chicago, IL 60611 3607
Fax: (312) 840-7400; Email: edlesniak@burklelaw.com
Counsel for: Aviall, Inc.

Eve Lettvin
Hugen & Harrison, LLP
885 Third Ave. FL 20
New York, NY 10022
Fax: (212) 918-0100; Email: ellettvin@hhlaw.com
Counsel for: Starwood Hotels & Resorts Worldwide, Inc.
Discover Financial Services

Charles B. Levin
Jenkins & Gilchrist
225 W. Washington St. Suite 2600
Chicago, IL 60606
Fax: (312) 425-3609; Email: clevin@jenkins.com
Counsel for: International Air Transport Association

Ira Levee
Lowenstein Sandler, P.C.
65 Livingston Avenue
Roseland, NJ 07068
Fax: (973) 567-7401; Email: ilevee@lowenstein.com
Counsel for: Int'l Assoc. of Machinists and Aerospace Workers

Sharon L. Levine
Lowenstein Sandler, P.C.
65 Livingston Ave.
Roseland, NJ 07068
Fax: (973) 567 2375; Email: slevine@lowenstein.com
Counsel for: Int'l Assoc. of Machinists and Aerospace Workers

James Levine, Chief Legal Counsel
Air Transportation Stabilization Board
1120 Vermont Ave. Suite 670
Washington, DC 20005
Fax: (202) 622-3420; Email: jlsb@do.treas.gov
Counsel for: Air Transportation Stabilization Board

Louis W. Levit, P.C.
Rosa & Hardius
150 North Michigan Avenue Suite 2500
Chicago, IL 60601-7567
Fax: (312) 750-8000; Email: louis.levit@rosahardius.com
Counsel for: IAE International Aero Engines AG

Richard F. Levy
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603
Fax: (312) 924-2748; Email: rlevy@jenner.com
Counsel for: Millipore Properties - Chicago, LLC

Stephen Lew
Office of the California Attorney General
300 So. Spring Street Suite 1700
Los Angeles, CA 90013-1230
Fax: 213/897-175; Email: stephen.lew@doj.ca.gov
Counsel for: California State Board of Equalization

Neil Lewis
Namura Babcock & Brown Co., Ltd.
BF, Dai Ichi Edobashi Building 1-11, Nihonbashi, 1-chome chuo-ku
Tokyo 103-0027, Japan
Fax: ; Email: neil@nbb.co.jp
Counsel for: Namura Babcock & Brown Co., Ltd

Michael C. Li
Baker Butts LLP
2001 Ross Avenue
Dallas, TX 75201
Fax: 214/9536603; Email: michael.li@bakerbutts.com
Counsel for: Blumenthal & Partners

Carolyn Livers, Asst. Atty. General
Colorado Department of Revenue
1525 Sherman Street, 5th floor
Denver, CO 80203-1700
Fax: (303) 865-5071; Email: janel.livers@state.co.us
Counsel for: Colorado Department of Revenue

Douglas J. Lipke
Vedder, Price, Kaufman & Kammholz
222 North LaSalle Street
Chicago, IL 60601-7500
Fax: (312) 609-5005; Email: dlipke@vedduprice.com
Counsel for: UAI Corporation

Bruce E. Lithgow
Bell, Boyd and Lloyd LLC
70 W. Madison Street Suite 3300
Chicago, IL 60602
Fax: 312/2781110; Email: blithgow@bellboyd.com
Counsel for: Hiram Edward Tolls

Daniel M. Litt
Dickstein Shapiro Morin & Oshinsky LLP
2101 L Street, N.W.
Washington, DC 20037-1526
Fax: 202/8871800; Email: dlitt@dsml.com
Counsel for: Allied Capital Corporation

Leslie D. Locke
Rosa & Hardius
150 North Michigan Avenue Suite 2500
Chicago, IL 60601-7567
Fax: (312) 750-8000; Email: llello.locke@rosahardius.com
Counsel for: IAE International Aero Engines AG

Dana J. Lockhart
Airbus North America Holdings, Inc.
188 Van Buren Street Suite 300
Hamdon, VA 22070
Fax: (703) 834-3547; Email: dana.lockhart@airbus.com
Counsel for: Airbus North America Holdings, Inc.

Sara E. Lorber
Holland & Knight LLP
131 S. Dearborn Street, 30th Floor
Chicago, IL 60603
Fax: 312/780688; Email: sara.lorber@hklaw.com
Counsel for: Gato Gourmet Inc.
Gato Safe, Inc.

James D. H. Loushin
Fasgus & Ureman LLP
2210 Wells Fargo Center 80 South Seventh Street
Minneapolis, MN 55402-3001
Fax: (612) 666-1600; Email: jloushin@fasgus.com
Counsel for: Frontier Airlines, Inc.

Paul A. Lucey
Michael Best & Friedrich LLC
100 L. Wisconsin Avenue Suite 3300
Milwaukee, WI 53202
Fax: 414/2770650; Email: plucey@mbf-law.com
Counsel for: Ameritrust Capital Corp

J. Christopher Luna

Cowles & Thompson, P.C.
401 Main Street, Suite 4000
Dallas, TX 75202-3793
Fax: (214) 672-2382; Email: chris.luna@atg.com
Counsel for: Sabir Inc.
Travelocity.com, L.P.
GetThere L.P.

Kevin Lund

Unit Providence Corporation
1 Fountain Square
Chattanooga, TN 37402
Fax: 423/551671; Email: klund@usumprovident.com
Counsel for: Unit Providence Corporation

Timothy J. Lynes

Katten Murphay Davis Rosenman
1025 Thomas Jefferson, N.W.
Washington, DC 20007
Fax: 202/267570; Email: timothy.lynes@kdmr.com
Counsel for: Societe Nationale D'Etude et de Construction
de Moteurs D'Aviation

John K. Lyons

Skadden, Arps, Slate, Meagher & Fiom LLP
333 W. Wacker Dr.
Chicago, IL 60606
Fax: (312) 407-8800; Email: jlyonsch@skadden.com
Counsel for: US Airways, Inc., MidAtlantic Airways Inc.
US Airways Group, Inc., US Airways Leasing
Allegheny Airlines, Inc.
Material Services Company, Inc.
Piedmont Airlines, Inc.

Joan MacDonald

Public Services Resources Corp.
80 Park Plaza, T-22
Newark, NJ 07102-4184
Fax: 973/4503500; Email: joan.mcdonald@psrg.com
Counsel for: N654UA

Bret A. Maidman

Lewis and Roca LLP
40 North Central Avenue, Suite 1800
Phoenix, AZ 85004-4420
Fax: (602) 734-3825; Email: bmaidman@lraaw.com
Counsel for: America West Airlines, Inc.

Terry John Malik

Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
Fax: (312) 558-5700; Email: tmalik@winston.com
Counsel for: Fleet Capital Leasing, Northwestern Mutual Life
SBC Capital Services, Sempra Energy
Bank One Corporation, Metromational Corp.
MarCap Corporation, Saline Mae, SITA
Pacific Harbor Capital, Inc.

James M. Malley

Angelo, Gordon & Co.
245 Park Avenue, 20th Floor
New York, NY 10167
Fax: (212) 807-0395; Email: jmalley@angelogordon.com
Counsel for: Angelo, Gordon & Co.

Jeanie Mar

Wells Fargo
708 Wilshire Blvd., 17th Fl. MAC: E2818-1/0
Los Angeles, CA 90017
Fax: (213) 614-3355; Email: jeanie.mar@wellsfargo.com
Counsel for: Wells Fargo

Lee Marable, Assistant City Attorney

City & County of Denver
Airport Legal Services - DIA 201 W. Colfax Ave. Dept. 1108
Denver, CO 80202
Fax: (720) 913-8420; Email: marablel@dia.denver.co.us
Counsel for: City & County of Denver
Denver International Airport

Ellen D. Marcus

Debevoise & Plimpton LLP
555 13th Street, N.W. Suite 1100F
Washington, DC 20004
Fax: (202) 388-8118; Email: edmarcus@debvoise.com
Counsel for: John Hancock Life Insurance Co.

Rod D. Margo

Condon & Forsyth LLP
1801 Avenue of the Stars, Suite 1450
Los Angeles, CA 90067-4488
Fax: 310/557-1288; Email: margo@offa.com
Counsel for: Air New Zealand, Ltd.

Andrew S. Marovitz

Mayer Brown Rowe & Maw LLP
100 S. LaSalle Street
Chicago, IL 60603
Fax: Email: amarovitz@mayerbrownrowe.com
Counsel for: UAL Loyalty Services, Inc.

Phillip D. Martin

Bank One, NA
1 Bank One Plaza, Mail Code IL1-10611
Mail Code IL1-0681
Chicago, IL 60670
Fax: (312) 732-1775; Email: phil_martin@bankone.com
Counsel for: Bank One

Matthew M. Martin

Neal, Gorber & Eisenberg
Two North LaSalle Street, Suite 2200
Chicago, IL 60601
Fax: 312/2891747; Email: mmartin@ngelaw.com
Counsel for: American State Bank
Holdrick & Struggles International, Inc.
DiamondCluster International, Inc.
Dallas/Ft. Worth Int'l Airport Board
Sage Paris Plus, Inc.

Renee Martin-Nagle

Airbus North America Holdings, Inc.
198 Van Buren Street, Suite 300
Herndon, VA 20170
Fax: (703) 834-3527; Email: renee.martinnagle@airbus.com
Counsel for: Airbus North America Holdings, Inc.

Philip V. Martino

Piper Rudnick
Suite 2000, 101 East Kennedy Blvd.
Tampa, FL 33602-5149
Fax: 312/6307334; Email: philip.martino@piperudnick.com
Counsel for: United as Special Labor Counsel

Waren J. Marwedel

Marwedel, Minichello & Reeb
10 S. Riverside Plaza, Suite 720
Chicago, IL 60606
Fax: (312) 902-8800; Email: wmarwedel@mmr-law.com
Counsel for: Chromalloy Gas Turbine Corporation

Patrick Matanane

Bank of New York Western Trust Company
550 Kearney Street, Suite 600
San Francisco, CA 94108
Fax: (415) 390-1647; Email: pmatanane@bankofny.com
Counsel for: Bank of New York Western Trust Company

Brenda A. Mattar

Mattar & D'Agostino, LLP
17 Court Street, Suite 600
Buffalo, NY 14202
Fax: 716/5658914; Email: attorney@bnd-law.com
Counsel for: Carga Buffalo c/o Cimihelli Development Co., Inc.

Patrick C. Maxcy

Sonnenschein, Nath & Rosenthal LLP
8100 Sears Tower, 233 S. Wacker Drive
Chicago, IL 60606
Fax: (312) 870-7034; Email: pmaxcy@sonnenschein.com
Counsel for: Creditors Committee

James M. McArdle

Ungaretti & Harris
3500 Three First National Plaza
Chicago, IL 60602
Fax: (312) 877-4405; Email: jmmcardle@uhlaw.com
Counsel for: Healthcare Service Corp
City & County of San Francisco
Denver International Airport

William McCarron, Jr.

Morton & Forster LLP
2000 Pennsylvania Ave. N.W. Suite 5500
Washington, DC 20006-1009
Fax: 202/8870793; Email: wmcarron@mfo.com
Counsel for: San Diego County Regional Airport Authority

David L. McClenahan

Kirkpatrick & Lockhart LLP
Henry W. Oliver Building, 635 Smithfield Street, #1500
Pittsburgh, PA 15222-2312
Fax: (412) 355-8501; Email: dmcclenahan@klt.com
Counsel for: State Street Bank and Trust Co.

Paul McDonnell, Treasurer and Tax Collector

County of Riverside
ATTN: Kevin O'Neil P.O. Box 12005
Riverside, CA 92502-2205
Fax: 909553090; Email: monell@co.riverside.ca.us
Counsel for: County of Riverside, California

C. Luckey McDowell

Baker Botts LLP
2001 Ross Avenue
Dallas, TX 75201
Fax: 2145538503; Email: luckey.mcdowell@bakerbotts.com
Counsel for: Brinkley & Partners

Timothy S. McFadden

Lord Bissell & Brook
115 S. LaSalle Street Suite 2800-3800
Chicago, IL 60613
Fax: (312) 443-0330; Email: pmcfadden@lordbissell.com
Counsel for: Societe Generale
Societe Generale, Chicago Branch
Societe Generale, Tokyo Branch
Societe Anonyme De Credit AL Industrie Financiere
Skylease 1; Blue Cross Blue Shield of Florida

Daniel J. McGuire

Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
Fax: 3123357700; Email: dmcguire@winston.com
Counsel for: Mizuho Corporate Bank, Ltd.

David P. McHugh

Schiff, Hardin & White
6800 Sears Tower
Chicago, IL 60608-6473
Fax: 3122586700; Email: dmchugh@schiffhardin.com
Counsel for: Crew Marketing

Colleen E. McManus

Piper Rudnick
203 N. LaSalle St. Suite 1800
Chicago, IL 60601-1203
Fax: 312/2367518; Email: colleen.mcmanus@piperudnick.com
Counsel for: Citibank PrivateBank AG

Robert Mead

Gavin Anderson & Company
220 East 42nd Street Suite 408
New York, NY 10017
Fax: (212) 315-1058; Email: rmead@gavinanderson.com
Counsel for:

John A. Menke

Pension Benefit Guaranty Corporation
Office of the General Counsel 1200 K Street, N.W., Suite 340
Washington, DC 20005-4026
Fax: (202) 328-4112; Email: Novay.Shannon@pbgc.gov
Counsel for: Pension Benefit Guaranty Corporation

Richard M. Meyers

Albany County Airport Authority
Albany International Airport Authority Administration Building Suite 200
Albany, NY 12211-1057
Fax: ; Email: rmeyers@albanyairport.com
Counsel for: Albany County Airport Authority

Krohn Micah

Neal, Gerber & Eisenberg
Two North LaSalle Street Suite 2200
Chicago, IL 60602-3601
Fax: 3122891747; Email: mkrohn@ngelaw.com
Counsel for: American State Bank
Heidrick & Struggles International, Inc.
DiamondCluster International, Inc.
Dallas/Ft. Worth Int'l Airport Board
Sage Parts Plus, Inc.

Kristin T. Mihelich, Esq.

Fogelhaber LLC
55 E. Monroe 40th Fl
Chicago, IL 60603
Fax: (312) 782-1828; Email: kmihelich@fogelhaber.com
Counsel for: Airline Reporting Corp

Emily A. Miller

Hogan & Hartson, LLP
Columbia Square 555 Thirteenth Street, N.W.
Washington, DC 20004-1109
Fax: (202) 637-5910; Email: eamiller@hhlaw.com
Counsel for: Eagle County Air Terminal Corporation

Lawrence E. Miller

LeBoeuf, Lamb, Greene & MacRae, LLP
One Riverfront Plaza
Newark, NJ 07102-5493
Fax: (973) 643-6111; Email: lmliller@llgm.com
Counsel for: Wachovia Bank, N.A.
Wells First Union National Bank

Michael C. Miller

Pension Benefit Guaranty Corporation
Office of the General Counsel 1200 K Street, N.W., Suite 340
Washington, DC 20005-4026
Fax: (202) 328-4112; Email: mfmiller@pbgc.gov
Counsel for: Pension Benefit Guaranty Corporation

Robert B. Millner

Sonnenschein, Nath & Rosenthal LLP
Suite 6000 Sears Tower 233 South Wacker Dr.
Chicago, IL 60606
Fax: (312) 878-7834; Email: rmillner@sonnenschein.com
Counsel for: Creditors' Committee

Alan K. Mills

James & Thornburg
11 South Meridian Street
Indianapolis, IN 46204
Fax: (317) 231-7433; Email: alan.mills@jtlaw.com
Counsel for: Indiana Transportation Finance Authority
Indiana Department of Commerce

Daniel B. Mills

Pretzel & Stouffer, Chartered
One South Wacker Drive, Suite 2500
Chicago, IL 60608-4073
Fax: ; Email: dmills@pretzelstouffer.com
Counsel for: American Airlines, Inc.

John B. Missing

Debevoise & Plimpton LLP
555 13th Street, N.W. Suite 1100E
Washington, DC 20004
Fax: (202) 383-8118; Email: jmissing@debbevoise.com
Counsel for: John Hancock Life Insurance Co

Donald B. Mitchell

Smith, Gambrell & Russell, LLP
Promenade II Suite 3100 1230 Peachtree, NE
Atlanta, GA 30309
Fax: (404) 686-0891; Email: dbmitchell@sgrlaw.com
Counsel for: American State Bank

Nancy A. Mitchell

Greenberg Traurig, LLP
77 West Wacker Drive, Suite 2400
Chicago, IL 60601
Fax: 3124588435; Email: nmitchell@gtlaw.com
Counsel for: City of Chicago

Michael L. Molinaro

Neal, Gerber & Eisenberg
Two North LaSalle Street Suite 2200
Chicago, IL 60602
Fax: (312) 260-1747; Email: mmolinaro@ngelaw.com
Counsel for: Anthem Blue Cross and Blue Shield
HMO Colorado

John J. Monaghan

Holland & Knight LLP
10 St. James Avenue
Boston, MA 02110
Fax: 6173230650; Email: jmonaghan@hklaw.com
Counsel for: Gale Gourmet Inc.

Eileen Moran

Public Service Resources Corp.
80 Park Plaza, T-22
Newark, NJ 07102-4194
Fax: 9734583589; Email: emoran.moran@psrc.com
Counsel for: NYS&NJ

John O. Morgan

Attorney at Law
333 W. Vine Street Suite 310
Lexington, KY 40507
Fax: 6062530508; Email: court@johnomorganjr.com
Counsel for: James D. Lyon, Trustee for the Computex, Inc.

Robert J. Mroka

Schulte, Roth & Zabel
919 Third Ave
New York, NY 10022
Fax: (212) 583-5955; Email: robert.mroka@ritz.com
Counsel for: CIT Group

Kevin G. Mruk

Bank One
1 Bank One Plaza Mail Suite IL-0288 11th Fl
Chicago, IL 60670
Fax: (312) 732-9753; Email: kevin_g.mruk@bankone.com
Counsel for: Bank One

David Mueller

Wayne Hummer Investments
300 S. Wacker Drive
Chicago, IL 60606
Fax: 3124310704; Email: dmuellet@whummer.com
Counsel for: Wayne Hummer Investments

D. Patrick Mullarkey

Internal Revenue Service
Tax Division (DOJ) P.O. Box 55 Glen Franklin Station
Washington, DC 20044
Fax: (202) 514-5248; Email: northem.unitedairlines@usdoj.gov
Counsel for: Department of Justice - Tax Division

Colleen Murphy, Esq.

Mintz, Levin, Cohn, Fierst, Glosky & Popeo, P.C.
One Financial Center
Boston, MA 02111
Fax: (617) 542-2241; Email: cmurphy@mintz.com
Counsel for: Fifth Third Bank, N.A.
HSBC Bank USA

Don Nathan

Robinson Law & Montgomery
75 Rockefeller Plaza 8th Floor
New York, NY 10019
Fax: 2122583129; Email: dnnathan@rlnet.com
Counsel for:

David M. Neff

Piper Rudnick
203 N. LaSalle St. Suite 1800
Chicago, IL 60601-1243
Fax: (312) 630-2758; Email: david.neff@piperudnick.com
Counsel for: Marriott International, Inc.

David A. Newby

McCarthy Duffy
180 N. LaSalle St. Suite 1400
Chicago, IL 60601
Fax: 3127766165; Email: dnewby@modislaw.com
Counsel for: IBM Corporation
IBM Credit Corporation
AMB Property Corporation

Robert M. Nicoud, Jr.

Olson Nicoud & Gueck, LLP
2200 Ross Avenue Suite 2525
Dallas, TX 75201
Fax: 2149797301; Email: rmnicoud@dallaslaw.com
Counsel for: Alliance Materials, LLC

Lynne B. Nowak

Holland & Knight LLP
111 St. James Avenue
Boston, MA 02118
Fax: 6175230850; Email: lnowak@hklaw.com
Counsel for: Gate Gourmet Inc.

Eric Oesterle

Sonnenschein, Nath & Rosenthal LLP
8000 Sears Tower 233 S. Wacker Drive
Chicago, IL 60606
Fax: 3128787834; Email: eoesterle@sonnenschein.com
Counsel for: Creditors Committee

Susan K. Olson

Armstrong Teasdale LLP
Metropolitan Square Suite 2500
St. Louis, MO 63102-2740
Fax: 3148215085; Email: solson@armstrongteasdale.com
Counsel for: City of St. Louis
Lambert St. Louis International Airport

Gerald F. Munitz

Coldberg, Kahn, Reil, Black, Rosenbloom & Munitz
35 L. Monroe St. Suite 3700
Chicago, IL 60603
Fax: (312) 332-2198; Email: gfm@goldberghkohn.com
Counsel for: State Street Bank & Trust Co.
State Street Bank & Trust Co. of Connecticut

John F. Murtha

Woodburn and Wedge
P.O. Box 2311
Reno, NV 89505
Fax: 7756883088; Email: jmurtha@woodburnandwedge.com
Counsel for: Airport Authority of Washoe County

Joel Nathan, Assistant United States Attorney

United States Attorney
Everett M. Dirksen Bldg. 219 S. Dearborn St. 6th Fl.
Chicago, IL 60604
Fax: (312) 353-2067; Email: joel.nathan@usdoj.gov
Counsel for: United States

Carole Neville

Sonnenschein, Nath & Rosenthal LLP
1221 Avenue of the Americas 24th Fl.
New York, NY 10020-1080
Fax: (212) 768-8800; Email: oneville@sonnenschein.com
Counsel for: Official Committee of Unsecured Creditors

Eric E. Newman

Meckler Bulger & Tilsen
123 North Wacker Drive Suite 1800
Chicago, IL 60606
Fax: 3124747898; Email: eric.newman@mbtlaw.com
Counsel for: United Railroad Pilots Benefit Protection
Association, an Illinois not-for-profit Corp

Daniel Northrop

Gardner, Carlton & Douglas
181 North Wacker Drive Suite 3700
Chicago, IL 60606-1895
Fax: 3125093000; Email: dnorthrop@gnd.com
Counsel for: BNP Paribas, Credit Agricole Indosuez S.A.
Diamond Leasing (USA), Inc.
Export Development Canada
Hamburg Landesbank Girozentrale, Hypovereitbank
Hypo Verona Bank

D. Tyler Nurnberg

Kaye Scholer, LLP
3 First National Plaza 7th W. Madison St. Suite 4100
Chicago, IL 60602
Fax: (312) 583 2300; Email: tnurnberg@kayscholer.com
Counsel for: JP Morgan Chase Bank
Citicorp USA, Inc.

Andrew J. Olins

Sugar, Friedberg & Fidensthal
30 North LaSalle St., Suite 3000
Chicago, IL 60602
Fax: (312) 372-7451; Email: aolins@sff-law.com
Counsel for: Sunbust Bank
Vanguard Municipal Bond Funds
Exploror Pipeline Company

Michael A. Olsen

Mayor Brown Rowe & Maw LLP
190 S. LaSalle Street
Chicago, IL 60603
Fax: ; Email: molsen@mayorbrownrowe.com
Counsel for: UAL Loyalty Services, Inc.

Nathalie Munzberg

White & Case LLP
1166 Avenue of the Americas
New York, NY 10038 2787
Fax: (212) 354-8113; Email: nmunzberg@whitecase.com
Counsel for: IAE International Aero Engines AG
UJ Bank Limited, Chicago Branch

Robert D. Nachman

Schwartz Cooper Greenberger Krauss
180 North LaSalle Street Suite 2700
Chicago, IL 60601
Fax: 3127828416; Email: nachman@scgk.com
Counsel for: Allied Capital Corporation

Jack Nearing

Pinney Bowes Credit Corporation
77 Waterview Drive
Shelton, CT 06484-4381
Fax: 4046725149; Email: jack.nearing@pb.com
Counsel for: Pinney Bowes Credit Corporation

James D. Newbold

Office of the Illinois Attorney General
100 West Randolph Suite 13-222
Chicago, IL 60601
Fax: 3128142540; Email: jnewbold@iageneral.state.il.us
Counsel for: California State Board of Equalization

Guyanne Nichols

Brierley & Partners
8401 N. Central Expressway Suite 100B, (B3)
Dallas, TX 75225
Fax: (214) 651-7714; Email: gnichols@brierley.com
Counsel for: Brierley & Partners

Shannon L. Novay

Pension Benefit Guaranty Corporation
Office of the General Counsel 1200 K Street, N.W., Suite 340
Washington, DC 20005-4028
Fax: (202) 328-4112; Email: novay.shannon@pbgc.gov
Counsel for: Pension Benefit Guaranty Corporation

Dennis M. O'Dea

Holler Eberman White & McAuliffe
120 W 45th Street
New York, NY 10036-4191
Fax: 2127837600; Email:
Counsel for: Goodrich Corporation

Matthew A. Olins

Katten Muchin Zavis Rosenman
525 West Monroe Street Suite 1800
Chicago, IL 60601-3893
Fax: 3128071081; Email: matthew.olins@kmzr.com
Counsel for: Examiner

Michael P. O'Neill

Sumner Bernard Aronson, P.C.
One Indiana Square Suite 3500
Indianapolis, IN 46204
Fax: (317) 283-3871; Email: moneill@sbala.com
Counsel for: Gallou International

Rosa Orenstein

Orenstein & Associates, P.C.
326 North Saint Paul Street, Ste. 2340
Dallas, TX 75201
Fax: (214) 751-9000; Email: rorenstein@orensteinlaw.net
Counsel for: Dallas/Ft. Worth Int'l. Airport Board

Kimberly W. Osenbaugh

Preston Gates & Lillis LLP
701 5th Avenue, Suite 5000
Seattle, WA 98104-7078
Fax: (206) 823-7022; Email: kimo@prestonlglaw.com
Counsel for: Maryland Aviation Administration
Port of Seattle

Merritt A. Pardini

Katten Muchin Zavis Rosenman
675 Madison Avenue
New York, NY 10022
Fax: (212) 940-4178; Email: merritt.pardini@kmzr.com
Counsel for: HypoVereinsbank

Christopher W. Parker

Rubin & Rudman LLP
50 Rowes Wharf
Boston, MA 02110
Fax: 6174399558; Email: cparker@rubinrudman.com
Counsel for: Tulsa Associated Health Maintenance Org., Inc.

Donald C. Pasulka

Ross & Hardies
150 North Michigan Avenue, Suite 2500
Chicago, IL 60611-7587
Fax: (312) 750-8600; Email: drcald@rosshardies.com
Counsel for: IAE International Aero Engines AG

Ronald R. Petersen

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611
Fax: 3125270484; Email: rpetersen@jenner.com
Counsel for: BA Leasing Parties

Gregory M. Petrick

Cadwalader, Wickersham & Taft
100 Maiden Lane
New York, NY 10038
Fax: (212) 504-8888; Email: gregory.petrick@cw.com
Counsel for: KBC Bank NV, Dresdner Bank AG New York, Landesbank Schleswig-Holstein, Bank Hapoalim, Bayerische Hypo- und Vereinsbank, Norddeutsche Landesbank, Summit Trust, and Riffebank Zentralbank, Mitsubishi Trust Corp

Joan E. Pilver

Office of the Attorney General
55 Elm Street 6th Floor P.O. Box 120
Hartford, CT 06141 0120
Fax: (800) 808-5383; Email: joan.pilver@PO.STATE.CT.US
Counsel for: State of Connecticut, Dept. of Rev.

David Poitras

Wayne Hummer Investments
300 S. Wacker Drive
Chicago, IL 60606
Fax: 3124310704; Email: dpoitras@whumner.com
Counsel for: Wayne Hummer Investments

David M. Posner

Hogan & Hartson, LLP
551 Fifth Ave.
New York, NY 10178
Fax: (212) 687-6086; Email: dmposner@hhlaw.com
Counsel for: Discover Financial Services
Shawnee Hotels & Resorts Worldwide, Inc.

Cynthia Christian Orihuela

Mission Funding Epison
Suite 1700 18101 Von Karman Avenue
Irvine, CA 92612
Fax: (949) 757-4141; Email: cchristian@edcap.com
Counsel for: Mission Funding Epison

Karen Ostad, Esq.

Lovells
900 Third Ave. 10th Fl.
New York, NY 10022
Fax: (212) 909-0888; Email: karen.ostad@lovells.com
Counsel for: Helaba Dublin Landes Bank Hessen-Thuringen Int'l

James A. Pardo, Jr.

King & Spalding LLP
181 Peachtree Street, N.E. 40th Floor
Atlanta, GA 30303
Fax: 4045725149; Email: jpardo@ktslaw.com
Counsel for: Pitney Bowes Credit Corporation

Joel C. Paschke

Wikman, Hammett, Allen & Dixon
225 West Wacker Drive
Chicago, IL 60606-1220
Fax: 3122012555; Email: paschkej@wikmanhammett.com
Counsel for: New Jersey Self-Insurers Guaranty Assn.

Robert Paul

FTI Consulting, Inc.
126 E. John Carpenter Freeway
Irving, TX 75062
Fax: (214) 754-7821; Email: robert.paul@fticonsulting.com
Counsel for: FTI Consulting, Inc.

David C. Petersen

City of Austin
Department of Aviation 114 West 7th Street, Fifth Floor
Austin, TX 78701
Fax: (512) 974-2014; Email: david.petersen@ci.austin.tx.us
Counsel for: City of Austin Dept. of Aviation

Diane M. Pezanoski

Deputy Corporation Counsel
City of Chicago 30 North LaSalle Street, Room 800
Chicago, IL 60602
Fax: (312) 744-8799; Email: dpezanoski@cityofchicago.org
Counsel for: City of Chicago

Alex Pirogovsky

Ungaretti & Harris
3510 Three First National Plaza
Chicago, IL 60602
Fax: (312) 877-4405; Email: apirogovsky@uhl.com
Counsel for: Healthcare Service Corp.
City & County of San Francisco
Dartmouth International Airport

Salvatore Poletta

Pitney Bowes Credit Corporation
27 Waterview Drive
Shallons, CT 06404-4361
Fax: 2038274079; Email: salvatore.poletta@pb.com
Counsel for: Pitney Bowes Credit Corporation

Paul V. Possinger

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611
Fax: (312) 823-2729; Email: ppossinger@jenner.com
Counsel for: General Electric Capital Corporation
and certain of its affiliates

Noel J. Orleans

Goins, Underkoffler, Crawford & Langdon
1201 Elm St. Suite 4000
Dallas, TX 75270
Fax: (214) 958-5002; Email: nello@gucl.com
Counsel for: Aviall, Inc.

Kenneth J. Ottaviano

Katten Muchin Zavis & Rosenman
Suite 1800 525 W. Monroe
Chicago, IL 60601
Fax: (312) 402-1051; Email: kenneth.ottaviano@kmzr.com
Counsel for: HypoVereinsbank

Ernie Z. Park

Bewley Lazleben & Miller LLP
13215 E. Pann Street Suite 510
Whittier, CA 90602-1787
Fax: 7149945131; Email: ernie.park@bewleylaw.com
Counsel for: Irvine Company

Kendra Pasek

United Air Lines, Inc.
WHOP 1290 East Algonquin Road
Lib Grove Village, IL 60007
Fax: ; Email: kendra.pasek@ual.com
Counsel for: UAL Corporation

Richard J. Pelliccio, Esq.

Schneider Harrison Segal & Lewis LLP
140 Broadway Suite 3100
New York, NY 10038-1101
Fax: (212) 672-8768; Email: RPelliccio@Schneider.com
Counsel for: C.I.I. Leasing

Bart Peterson, Mayor

City of Indianapolis
290 East Washington St. Rm 2501
Indianapolis, IN 46204
Fax: (317) 327-3680; Email: rahemans@indy.gov
Counsel for: City of Indianapolis

Andrew F. Pierce

Pierce & Shesher LLP
2485 E. Bayshore Road Suite 403
Palo Alto, CA 94303
Fax: ; Email:
Counsel for: Bridette C. Thomas

Thomas E. Pitts, Jr.

Sidley, Austin, Brown & Wood LLP
787 Seventh Ave.
New York, NY 10019
Fax: 2128396588; Email: tpitts@sidley.com
Counsel for: Boeing Company
Boeing Capital Corp.

Alan W. Pope

Moore & Van Allen PLLC
Bank of America Corporate Center 100 North Tryon Street, Suite 4700
Charlotte, NC 28202-4003
Fax: 7043311158; Email: alanpope@mvalaw.com
Counsel for: KeyCorp Leasing, Ltd.

James Poyner

Poyner Baxter
Lonsdale Quay Plaza 408 145 Gladwick Court
North Vancouver, BC V7M 3K1 Canada
Fax: : Email: poyner.baxter@telus.net
Counsel for: Always Travel, Inc.
Highbourn Enterprises, Inc.
Canadian Standard Travel Agent Registry

Rachel Pusey

Dolan Law Firm
333 Pine Street 4th Floor
San Francisco, CA 94104
Fax: 4154212830; Email: rchase@cbdlaw.com
Counsel for: Kenneth Scott Jucker

Narayan Raj

Delaware Bay Company, Inc.
880 Fifth Avenue 22nd Floor
New York, NY 10019
Fax: (212) 204-8583; Email: narayan@delbay.com
Counsel for: Delaware Bay Company, Inc.

Paul L. Ratelle

Fabyarske, Wadon & Hart
420 Second Avenue South Suite 1100
Minneapolis, MN 55402
Fax: (612) 338-3857; Email: pratele@twilaw.com
Counsel for: Bruner Business Finance Corporation

Craig E. Reimer

Mayer Brown Rowe & Maw LLP
180 South LaSalle
Chicago, IL 60603
Fax: 3127017711; Email: creimer@mayerbrownrowe.com
Counsel for: Glenn F. Tilton

Paul H. Repp

Varizon Capital Corp.
245 Park Avenue 40th Floor
New York, NY 10107
Fax: (212) 557-4571; Email: paul.h.repp@varizon.com
Counsel for: Varizon Capital Corporation

Peter J. Roberts

D'Anzono & Pflaum
111 E. Wacker Dr., Suite 2800
Chicago, IL 60601
Fax: (312) 662-3000; Email: p.roberts@danzona.com
Counsel for: Ad Hoc Committee of Notahditors

William J. Rochelle, III

Fubright & Jeworski LLP
688 Fifth Avenue
New York, NY 10103
Fax: (212) 318-3480; Email: wrochelle@fubright.com
Counsel for: BNY Capital Resources Corp.
BNY Capital Funding LLC
certain affiliates of ORIX Corp
certain affiliates of Fuyo General Lease Co.

Robert J. Rosenberg

Lehman & Watkins
885 Third Avenue, Suite 1000
New York, NY 10152-4802
Fax: (212) 731 4864; Email: robert.rosenberg@lw.com
Counsel for: AOL Time Warner, Inc.

Matthew F. Prewitt

Greenberg Traurig, LLP
77 West Wacker Drive, Suite 2400
Chicago, IL 60601
Fax: 3124588435; Email: prewittm@gtlaw.com
Counsel for: City of Chicago

Shabana N. Qaiser

Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York, NY 10178-0081
Fax: 2126971659; Email: sqaiser@cm-p.com
Counsel for: Air Transportation Stabilization Board

Ivan A. Ramos, Assistant Corporation Counsel

City of Hartford
Office of the Corporation Counsel 550 Main Street
Hartford, CT 06103
Fax: : Email: klaufman@ci.hartford.ct.us
Counsel for: City of Hartford, Connecticut

Dennis Raterink

Department of Attorney General
Workers' Compensation Division P.O. Box 30217
Lansing, MI 48909
Fax: (517) 335-4879; Email: raterinkd@michigan.gov
Counsel for: State of Mich., Self-Insurers' Sec.Fund
State of Mich. Funds Administration

Sheree Reinbach, Esq.

Arent Fox Kintner Plotkin & Kahn, PLLC
1875 Broadway 25th Floor
New York, NY 10019
Fax: (212) 484-3990; Email: dubrowd@arentfox.com
Counsel for: Suntrust Bank
Vanguard Municipal Bond Funds

Christopher L. Rexroat

Ungeretti & Harris
3500 Three First National Plaza
Chicago, IL 60602
Fax: (312) 977-4405; Email: clrexroat@ulaw.com
Counsel for: Healthcare Service Corp.
City & County of San Francisco
Denver International Airport

Terril A. Roberts, Deputy County Attorney

Pima County, Arizona
32 N. Stone Suite 2100
Tucson, AZ 85701
Fax: 5208708556; Email:
Counsel for: Pima County, Arizona

Martha E. Romero

Romero Law Firm
7743 South Painter Avenue Suite F
Whittier, CA 90602
Fax: 5628075820; Email: mromero@ristextreme.com
Counsel for: County of San Bernardino

Risa M. Rosenberg

Milbank, Tweed, Hadley & McCloy LLP
1 Chase Manhattan Plaza
New York, NY 10005
Fax: (212) 822-5148; Email: rosenberg@milbank.com
Counsel for: BNP Paribas, Credit Agricole Indosuez S.A.
Diamond Lease (USA), Inc.
Export Development Canada
Hamburg Landesbank Genzentrale, HypoVereinsbank
Luxembourg Societe Anonyme, et al.

Daniel B. Prieto

Jones, Day, Reavis & Pogue
77 West Wacker
Chicago, IL 60601
Fax: (312) 782-6585; Email: jdpruet@jonesday.com
Counsel for: National Processing Company LLC
National City Bank of Kentucky

Dennis E. Quaid, Esq.

Faguthaber LLC
55 E. Monroe 40th Fl.
Chicago, IL 60603
Fax: (312) 782-1828; Email: dquaid@faguthaber.com
Counsel for: Airline Repairing Corp.
San Diego County Regional Airport Authority

Tonya Ramsey

Vinson & Elkins LLP
2001 Ross Avenue
Dallas, TX 75201
Fax: (214) 220-7716; Email: tonysr@vewlaw.com
Counsel for: Dallas/Ft. Worth Int'l Airport Board

Carrie Marie Raver

Mayer Brown Rowe & Maw LLP
180 S. LaSalle Street
Chicago, IL 60603
Fax: : Email: craver@mayerbrownrowe.com
Counsel for: UAL Loyalty Services, Inc.

Steven J. Reisman

Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York, NY 10178-0081
Fax: (212) 697-1659; Email: lankmipsky@cm-p.com
Counsel for: Air Transportation Stabilization Board

Robert E. Richards

Sonnenschein, Nulb & Rosenthal LLP
Suite 8000 Sears Tower 233 South Wacker Dr.
Chicago, IL 60606
Fax: (312) 878-7034; Email: rre@sonnenschein.com
Counsel for: Creditors Committee

David Roberts, Executive Director

Indianapolis Airport Authority
2500 South High School Road Box 110
Indianapolis, IN 46241
Fax: (317) 487-5034; Email: droberts@aiaa.com
Counsel for: Indianapolis Airport Authority

Jack J. Rose

White & Case LLP
1155 Avenue of the Americas
New York, NY 10030-2787
Fax: (212) 354-4113; Email: jrose@whitecase.com
Counsel for: Aircraft Finance Parties
Societe Generale
UFJ Bank Limited, Chicago Branch
British Aircraft Interiors Systems, Inc.

Andrew S. Rosenman

Mayer Brown Rowe & Maw LLP
180 S. LaSalle Street
Chicago, IL 60603
Fax: : Email: arosenman@mayerbrownrowe.com
Counsel for: UAL Loyalty Services, Inc.

David A. Rosenzweig, Esq.

Fulbright & Jaworski LLP
600 Fifth Avenue
New York, NY 10110
Fax: (212) 318-3400; Email: drosenw@fulbright.com
Counsel for: BNY Capital Resources Corp.
BNY Capital Funding LLC
ORIX
Fuyo General Lease Company

David E. Runck

Oppenheimer Wolff & Donnelly LLP
Plaza VII Suite 3300 45 South Seventh Street
Minneapolis, MN 55402
Fax: (612) 677-7100; Email: drunck@oppenheimer.com
Counsel for: Navteq, Inc.

Peter D. Rutherford

Verizon Capital Corp
245 Park Avenue 40th Floor
New York, NY 10167
Fax: (212) 557-4572; Email: peter.d.rutherford@verizon.com
Counsel for: Verizon Capital Corporation

Timothy J. Sandell

US Bank National Association
180 E. 5th Street 4th Floor Mail Station EP-MN-T4CT
St Paul, MN 55101
Fax: (651) 244-5847; Email: timothy.sandell@usbank.com
Counsel for: US Bank National Association

Andrew O. Schiff, Esq.

Klehr, Harrison, Harvey, Branzburg & Eilers LLP
200 South Broad St.
Philadelphia, PA 19107
Fax: (215) 568-6803; Email: aschiff@klehr.com
Counsel for: Philadelphia Department of Commerce

Peter J. Schmidt

Ronks Pina
10 South Wacker Drive Suite 2300
Chicago, IL 60606
Fax: 8006940030; Email:
Counsel for: John D. Stewart
John H. Fulmer
Leyton S. Han
Craig S. Stevans

Jeffrey M. Schwartz

Gardner, Carton & Douglas
321 North Clark St. Suite 3400
Chicago, IL 60610
Fax: (312) 844-3381; Email: jschwartz@gcd.com
Counsel for: BNP Paribas, Credit Agricole Indosuez S.A.
Diamond Lease (USA), Inc.
Export Development Canada
Hamburg Landesbank Ginzentrale, Hypovereitbank
Luxembourg Societe Anonyme, et al.

Stephen Searl

Sidley, Austin, Brown & Wood LLP
787 Seventh Avenue
New York, NY 10010
Fax: (212) 839-5500; Email:
Counsel for: Boeing Company
Boeing Capital Corp. and their affiliates

Robert A. Seltzer

Cornfield & Feldman
25 E. Washington St. Suite 1400
Chicago, IL 60602
Fax: (312) 230-8890; Email: rseltzer@cornfieldandfeldman.com
Counsel for: Association of Night Attendants

Ryan Routh

Jones, Day, Reavis & Pogue
North Point 101 Lakeside Avenue
Cleveland, OH 44114
Fax: (216) 579-0212; Email: routh@jonesday.com
Counsel for: National Processing Company LLC
National City Bank of Kentucky

Michael C. Rupe

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611
Fax: (312) 527-0484; Email: mrupe@jenner.com
Counsel for: General Electric Capital Corporation
General Electric affiliates

Dennis M. Ryan

Fayrer & Benson LLP
2200 Wells Fargo Center
Minneapolis, MN 55402-3601
Fax: (612) 556-1600; Email: dryan@fayrer.com
Counsel for: Frontier Airlines, Inc.

Robert Q. Sanker

Keating, Muething & Klakamp, PLL
1400 Provident Tower One East Fourth Street
Cincinnati, OH 45202
Fax: (616) 766-4577; Email: rsanker@kmklaw.com
Counsel for: SMS Acquisition, Inc.

Kimberly Schmidt

King & Spalding LLP
101 Peachtree Street
Atlanta, GA 30303
Fax: 4045725149; Email: kschmidt@kslaw.com
Counsel for: Pitney Bowes Credit Corporation

S. Robert Schrage

Bardy & Schloss LLP
60 East 42nd Street
New York, NY 10105
Fax: (212) 972-1877; Email: rschrage@bardschloss.com
Counsel for: Chumakovsky Gas Turbine Corporation

Michael A. Scodro

Mayor Brown Rowe & Maw LLP
190 S. LaSalle Street
Chicago, IL 60603
Fax: (312) 435-3584; Email: mscodro@mayorbrownrowe.com
Counsel for: UAL Loyalty Services, Inc.

Jay A. Selcov, Esq.

The Port Authority of NY & NJ
Office of Milton H. Pachter Law Department 225 Park Ave. South 13th F
New York, NY 10003
Fax: (212) 435-3584; Email: jselcov@pachterjov
Counsel for: Port Authority of NY & NJ

Scott A. Shail

Hogan & Hartson, LLP
Columbia Square 555 Thirteenth Street, N.W.
Washington, DC 20004-1106
Fax: (202) 637-5010; Email:
Counsel for: Logix County Air Terminal Corporation

Sharon L. Royer, UC Tax Agent/Bankruptcy Reprer

Commonwealth of Pennsylvania DOJ
Harrisburg Bankruptcy & Compliance 1171 S Cameron St. Rm 312
Harrisburg, PA 17104-2513
Fax: 7177720873; Email: shenry@state.pa.us
Counsel for: Bureau of Employee Tax Operations (BETO)
Department of Labor and Industry
Commonwealth of Pennsylvania

Allyson B. Russo

Vedder Price Kaufman & Kammholz
222 North LaSalle Street Suite 2600
Chicago, IL 60601-1003
Fax: 3128065005; Email: arusso@vedderprice.com
Counsel for: UAL Corp.

Thomas J. Salerno

Squire, Sanders & Dempsey LLP
Two Renaissance Square 40 North Central Avenue Suite 2700
Phoenix, AZ 85004-4408
Fax: (602) 441-1100; Email: tsalerno@squid.com
Counsel for: Sky Mail

Robert H. Schelbe

Morgan, Lewis & Bockius, LLP
101 Park Ave.
New York, NY 10178
Fax: (212) 300-6001; Email: rschelbe@morganlewis.com
Counsel for: JP Morgan Chase Bank
Citibank USA, Inc.
Citicorp USA, Inc.

Kelly Schmidt

Hamilton-Sundstrand
4747 Harrison Avenue Mail Stop 214-B
Rockford, IL 61108
Fax: 8152282855; Email: kelly.schmidt@hs.lc.com
Counsel for: Hamilton-Sundstrand

Charles P. Schulman

Sachnoff & Weaver, Ltd.
30 Wacker Drive 28th Floor
Chicago, IL 60606
Fax: (312) 207-6400; Email: cschulman@sachnoff.com
Counsel for: AT&T

Sean T. Scott, Esq.

Mayor Brown Rowe & Maw LLP
190 S. LaSalle St.
Chicago, IL 60603
Fax: (312) 701-7711; Email: sscott@mayorbrownrowe.com
Counsel for: ABN-AMRO Bank, NV

David R. Seligman

Kirkland & Ellis
200 E. Randolph Drive
Chicago, IL 60601
Fax: (312) 981-2200; Email: david.seligman@kirkland.com
Counsel for: UAL Corporation

Michael Shannon, Case Manager

The Travelers Insurance Company
One Tower Square
Hartford, CT 06183
Fax: (800) 277-2158; Email: mshannon@travelers.com
Counsel for: Travelers Indemnity Company
Aetna Casualty and Surety Company

Keith J. Shapiro

Greenberg Traurig, LLP
77 West Wacker Dr., Suite 2400
Chicago, IL 60601
Fax: (312) 456-8435; Email: kshapiro@gtlaw.com
Counsel for: City of Chicago

Leslie Shigaki

Pittsury Winthrop LLP
1540 Broadway
New York, NY 10036
Fax: 212 581 6000; Email: lshigaki@pittsurywinthrop.com
Counsel for: Verwaltungsgesellschaft MBH & Co. et al.
Otto Lilenhal
PRG Capital Partners LLC
Mitsui & Co. (USA), Inc.
Cooperatieve Centrale Raiffeisen-Boerenleenbank

Carren Shulman

Heller Ehrman White & McAuliffe
120 West 45th Street
New York, NY 10036-4041
Fax: ; Email: cshulman@hewm.com
Counsel for: Goodrich Corporation

Thomas P. Silber

Miami-Dade County Attorney's Office
Assistant County Attorney's Office P.O. Box 502075 AMF
Miami, FL 33158
Fax: 305 876 7294; Email: tabbott@miami-airport.com
Counsel for: Miami-Dade County, Florida

Jack A. Simms, Esq.

Baker & McKenzie
One Prudential Plaza 130 E. Randolph St.
Chicago, IL 60601
Fax: (312) 801-2988; Email: jack.a.simms@bakermkt.com
Counsel for: Driffield Services, Inc.

Will S. Skinner

Condon & Forsyth LLP
1801 Avenue of the Stars Suite 1150
Los Angeles, CA 90067-4498
Fax: 310 557 1289; Email: wskinner@cfa.com
Counsel for: Air New Zealand, Ltd.

Gerald K. Smith

Lewis and Roca LLP
40 North Central Avenue
Phoenix, AZ 85004-4428
Fax: (602) 734-3834; Email: gsmith@lhw.com
Counsel for: Alaska Airlines, Inc.

Tracy Smith

Atlantic Coast Airlines
45700 Business Ct.
Dulles, VA 20186-9102
Fax: (703) 650-8290; Email: tracy_smith@acalcorp.com
Counsel for: Atlantic Coast Airlines

Youssef Sniffer

Davis Wright Tremaine LLP
2600 Century Square 1501 Fourth Avenue
Seattle, WA 98101-1688
Fax: (206) 628-7899; Email: youssef.sniffer@dw.com
Counsel for: Microsoft Corporation
MSU, GP

Christopher T. Sheean

Kelley, Drye & Warren, LLP
333 West Wacker Drive
Chicago, IL 60601
Fax: (312) 857-7085; Email: csheean@kelleydrye.com
Counsel for: Pension Benefit Guaranty Corporation

Mark Shinderman

Munger, Tolles & Olson LLP
355 South Grand Avenue, Suite 3500
Los Angeles, CA 90071-1500
Fax: (213) 853-4010; Email: shinderman@mto.com
Counsel for: Mission Funding Epsilon

Maricela Siewczynski

Cowles & Thompson, P.C.
901 Main Street Suite 4000
Dallas, TX 75202-3743
Fax: (214) 672-2390; Email: msimonre@cowlesthompson.com
Counsel for: Sabre Inc.
Travelocity Com, L.P.
QulThera L.P.

Mayor Silber

SR/SE Counsel, IRS
200 W. Adams St. Suite 2000
Chicago, IL 60606 5208
Fax: (312) 886-9244; Email: mayor.y.silber@irsaccount.treas.gov
Counsel for: Internal Revenue Service

Bruce H. Simon

Cohen, Weiss and Simon LLP
330 West 42nd Street 25th Floor
New York, NY 10036 8878
Fax: (646) 473-8731; Email: bsimon@cwslaw.com
Counsel for: ALFA

Gigi G. Skipper, General Counsel, Legal Affairs De

Hillsborough County Aviation Authority
Tampa International Airport P.O. Box 22287
Tampa, FL 33622
Fax: 813 870 7868; Email: gskipper@tampaintlport.com
Counsel for: Hillsborough County Aviation Auth of Tampa, FL

Thomas C. Smith

Ice Miller
135 S. LaSalle St. Suite 4100
Chicago, IL 60603
Fax: (312) 641-0903; Email: tsmith@icemiller.com
Counsel for: Indianapolis Airport Authority
Gilex Gas & Coke Utility

William P. Smith

McDermott, Will & Emery
221 West Monroe Street
Chicago, IL 60606-5085
Fax: (312) 284-7700; Email: wsmith@mwe.com
Counsel for: Bank of New York

Lawrence K. Snider, Esq.

Mayer Brown Rowe & Mew LLP
190 S. La Salle St.
Chicago, IL 60603 3441
Fax: (312) 701-7711; Email: lsnider@mayerbrown.com
Counsel for: Philip Morris Capital Corp.
General Foods Credit Insurance Nw 3 Corp.

Beverly H. Shideler

IBM Corporation
2707 Butterfield Road
Oakbrook, IL 60523
Fax: (800) 988-4561; Email: bshideler@us.ibm.com
Counsel for: IBM Corporation

J. Christopher Shore

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
Fax: 212 354 8113; Email: cshore@whitecase.com
Counsel for: Societe General

Mike Sigal, Jr.

Simpson, Thatcher & Bartlett
426 Lexington Avenue
New York, NY 10017-3054
Fax: (212) 455-2502; Email: msigal@stblaw.com
Counsel for: Airbus North America Holdings, Inc.

Adam P. Silverman

Adelman, Gentlemen, Merens, Berish & Carter, Ltd.
53 West Jackson Blvd; Ste 1050
Chicago, IL 60604
Fax: 312 435 1059; Email: apsilv@agmbc.com
Counsel for: Mitsui & Co. Ltd.; Sumitomo Corp
Verwaltungsgesellschaft MBH & Co. et al.
Mitsui & Co. International (Europe)
Marubeni America Corporation; UGT Kumiai
Wells Fargo Bank Northwest, NA

Paul S. Singerman

Berger Singerman, P.A.
200 S. Biscayne Blvd. Suite 1000
Miami, FL 33134
Fax: (305) 714-4340; Email: psingerman@bergersingerman.com
Counsel for: Timco Aviation Services, Inc.

Carol A. Stocum, Esq.

Klehr, Harrison, Harvey, Branzburg & Liers LLP
280 South Broad St.
Philadelphia, PA 19102
Fax: (800) 480 4876; Email: cstocum@klehr.com
Counsel for: Philadelphia Department of Commerce

Michael W. Smith

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036-2787
Fax: (212) 354-8113; Email: msmith@whitecase.com
Counsel for: IAP International Aero Engines AG

Elizabeth Page Smith

LeBoeuf, Lamb, Greene & MacFarr, LLP
125 West 55th Street
New York, NY 10019-5389
Fax: (212) 424-8500; Email: esmith@lbgm.com
Counsel for: Wachovia Bank, N.A.
The First Union National Bank

Elizabeth Sobek

Field & Cohen
Three First National Plaza 70 West Madison, Suite 1500
Chicago, IL 60602-4208
Fax: (312) 263-0989; Email: esobek@fieldncohen.com
Counsel for: UAL ESOP

Steven C. Solazzo

Carpenter, Bennett & Morrissey
3 Gateway Center
Newark, NJ 07102
Fax: 973/625-3114; Email: ssolazzo@carphen.com
Counsel for: New Jersey Self-Insurers Guaranty Assn

Sheldon L. Solow

Kaye Scholer, LLP
Three First National Plaza 70 W. Madison St. Suite 4100
Chicago, IL 60602
Fax: (312) 583-2380; Email: ssolow@kayescholer.com
Counsel for: JP Morgan Chase Bank
Citicorp USA, Inc.

James Spilotto

Chapman and Cutler
111 W. Monroe Street
Chicago, IL 60603
Fax: (312) 701-2381; Email: spilotto@chapman.com
Counsel for: Wells Fargo
Pacific Investment Management Co.
Reams Asset Management Co. LLC
Metropolitan Washington Airport Authority

Anthony G. Stamato, Esq.

Baker & McKenzie
One Prudential Plaza 130 E. Randolph Street
Chicago, IL 60601
Fax: (312) 881-2899; Email: anthony.g.stamato@bakernet.com
Counsel for: Driesen Services, Inc.

Catherine Staege

Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611
Fax: (312) 840-7352; Email: cstaege@jenner.com
Counsel for: AT&T Credit Holdings, Inc., et al
Credit Lyonnais, et al
UFI Bank Limited, et al
WestLB AG; KBC Bank NB
JL Miami Lease Co., Ltd., et al.

Dirk Stock

Transamerica Aviation LLC
5080 Spectrum Drive Suite 1100 West
Addison, TX 75001
Fax: Email: dirk.stock@transamerica.com
Counsel for: Transamerica Aviation LLC

Daphnee Surpris

Sonnenwachen, Nath & Rosenthal LLP
1221 Avenue of the Americas 24th floor
New York, NY 10020
Fax: (212) 769-8800; Email: dsurpris@sonnenwachen.com
Counsel for: Official Committee of Unsecured Creditors

Andrew W. Swain, Assistant Attorney General

Colorado Attorney General's Office
Colorado Dept. of Local Affairs 1625 Shuman Street, 5th floor
Denver, CO 80203-1780
Fax: (303) 866-5671; Email: andrew.swain@state.co.us
Counsel for: Colorado Department of Local Affairs,
Property Tax Division

Samuel J. Teale

Lowenstein Sandler, P.C.
65 Livingston Avenue
Roseland, NJ 07068
Fax: (813) 507-2347; Email: steale@lowenstein.com
Counsel for: IAM

Beth Solomon, Esq.

Discover Financial Services, Inc.
2500 Lake Cook Rd.
Riverwood, IL 60015
Fax: (847) 406-4977; Email: bethsolomon@discoverfinancial.com
Counsel for: Discover Financial Services

Michael B. Solow

Kaye Scholer, LLP
3 First National Plaza, Suite 4100 70 West Madison Street
Chicago, IL 60602
Fax: (312) 583-2380; Email: msolow@kayescholer.com
Counsel for: JP Morgan Chase Bank
Citicorp USA, Inc.

James H. Sprayregen, Esq.

Kirkland & Ellis
200 E. Randolph Drive Suite 6500
Chicago, IL 60601
Fax: (312) 881-2200; Email: james_sprayregen@chicago.kirkland.com
Counsel for: UAL Corporation

Karen J. Stapleton

County of Loudoun, Virginia
One Harrison Street, S.E., 5th floor
Leesburg, VA 20175
Fax: (703) 771-5026; Email: kstaplet@loudoun.gov
Counsel for: County of Loudoun, Virginia

Michael R. Stewart

Faegre & Benson LLP
2200 Walsh Fargo Center 80 S. Seventh St
Minneapolis, MN 55409-3901
Fax: (612) 766-1080; Email: mstewart@faegre.com
Counsel for: US Bancorp Equipment Finance, Inc.

Merrill Stone

Kelley, Drye & Warren, LLP
101 Park Avenue
New York, NY 10178
Fax: (212) 808-7897; Email: MStone@KelleyDrye.com
Counsel for: Pension Benefit Guaranty Corporation

Cynthia Surrill

Piper Rudnick
1380 Corporate Center Drive Suite 325
Eagan, MN 55121-1200
Fax: 6514540000; Email: cynthia.surrill@piperudnick.com
Counsel for:

Sidney K. Swinson

Gable & Golewa
1100 ONLOR Plaza 100 W. Fifth Street
Tulsa, OK 74103-4217
Fax: 0186964990; Email: swinson@gablelaw.com
Counsel for: Explorer Pipeline Company

Alan P. Solow

Goldberg, Kohn, Bell, Black, Rosenbloom & Mertz
55 E. Monroe St. Suite 3700
Chicago, IL 60603
Fax: (312) 332-2198; Email: alan.solow@goldbergkohn.com
Counsel for: State Street Bank & Trust Co.
State Street Bank & Trust Co. of Connecticut

Randy B. Soref

Buchalter, Newman, Fields & Younger
601 S. Figueroa St. Suite 2400
Los Angeles, CA 90017
Fax: 2138960400; Email: rsoref@buchalter.com
Counsel for: Cathay Bank
General Bank

Nicolas P. Stable

White & Case LLP
1165 Avenue of the Americas
New York, NY 10011
Fax: 2125648113; Email: nstable@whitecase.com
Counsel for: Societe Generale

Stephen C. Stapleton

Cowles & Thompson, P.C.
901 Main Street
201 Main Street Suite 4000
Dallas, TX 75202-3783
Fax: (214) 872-2390; Email: sstapleton@cowlesthompson.com
Counsel for: Sabre Inc.
Travelocity.Com, I P.
GetThere LP.

Randolph J. Stierer

11th Third Bank
38 Fountain Square Plaza MD10AT80
Cincinnati, OH 45263
Fax: (513) 534-8785; Email: randy.stierer@53.com
Counsel for: Indianapolis Airport Authority

H. Rey Stroube, III

Akin Gump Strauss Hauer & Field LLP
711 Louisiana Room 1900
Houston, TX 77022
Fax: (713) 238-0822; Email: rstroube@akingump.com
Counsel for:
Ad Hoc Committee of ETC and EETC Holders

Ronald R. Sussman

Kronish Lieb Weiner & Hellman LLP
1114 Avenue of the Americas
New York, NY 10036
Fax: (212) 479-6275; Email: rsussman@kronishlieb.com
Counsel for: UAL ESOP

Gregg E. Szilagyi

Urgardti & Harris
3500 Three First National Plaza
Chicago, IL 60602
Fax: (312) 977-4405; Email: greg.szilagyi@uhlaw.com
Counsel for: Denver International Airport
City & County of San Francisco
Healthcare Service Corp.